No. 10877

In the
United States
Circuit Court of Appeals
In and for the Ninth Circuit

AL G. BARNES AMUSEMENT COMPANY, a corporation, sued as AL G. BARNES, INC., and RINGLING BROS.-BARNUM & BAILEY COMBINED SHOWS, INC.,

Appellants,

vs.

AMERICA OLVERA, also known as AMERICA POLLINGER,

Appellee.

REPLY BRIEF FOR APPELLEE

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TABLE OF CASES AND AUTHORITIES CITED

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REPLY BRIEF FOR APPELLEE

This is an appeal by the defendants from the final judgment of the trial court, by which the plaintiff was awarded damages for personal injuries in the sum of fifty thousand dollars.

This was the second trial of the case. In the first trial judgment was rendered for the plaintiff but a reversal was ordered because of an erroneous instruction concerning the type of negligence which is es-

sential to a recovery under a clause in the contract agreement which, on its face, purports to release the contractor from all claims growing out of any injury to the artist during the performance of the contract.

Since nearly all of the issues and questions argued in Appellants' Opening Brief have been determined by this court's decision[1] in the former appeal by virtue of the doctrine of the law of the case it is important to review the scope of that decision. Questions decided are:

1. "There is evidence from which the jury properly could infer that Ringling placed Olvera with Barnes; that Barnes Circus was one of 'its,' Ringling's Circuses within the meaning of the" agreement between Ringling and Olvera, "that Barnes Circus" was "under the management of Ringling at the time Olvera received her injuries in one of Barnes' performances."

   In other words, there was evidence from which liability of both defendants might be properly inferred, if the other essential elements of plaintiff's case is established.

2. That " there is evidence from which the jury properly could infer . . . that they (said injuries) were caused by either the *gross negligence* or ordinary negligence of Barnes' employees while so under Ringling's management."

3. "There was evidence from which the jury could infer that Barnes had assumed those incidents

Note[1]—119 F (2d) 584. A copy is set forth in the Appendix to this brief.

of Olvera's act which consisted of furnishing and 'maintaining' parts of its equipment and 'apparatus,' namely, the trapeze . . . and a net and persons to maintain it beneath her trapeze to catch her in safety in the event of an untimely fall."

4. That "there was evidence from which the jury could infer" that there was either gross or ordinary negligence in setting up and maintaining the trapeze whereby the fall was occasioned, and on the part of the net holders in failing to hold it under her."

5. That there was evidence from which the jury could infer that such negligence of the Barnes' employees caused "the injuries and damages to her for which the jury gave its verdict."

6. That "Olvera might recover though she knew the danger and peril if the work she was engaged in and chose to accept them, unless the danger and peril were the proximate cause of her injuries."

7. That the provision of the contract which stipulates "that the law of Florida shall control its interpretation" and provides that such law shall control "all the liabilities and obligations of the parties with regard to the performance and execution is to be applied in this case, even though the law of the forum is different."

8. That "the Ringling-Olvera contract exempts the appellants from liability for their ordinary negligence," but does not exempt them from their "gross negligence."

9. That gross negligence was properly defined in defendants' requested instruction which read:

"Gross negligence is different from and greater than ordinary negligence. Gross negligence has been defined as want of slight diligence, as an entire failure to exercise care, or the exercise of so slight a degree of care as to justify the belief that there was an indifference to the things and welfare of others, and as that want of care which would raise a presumption of the conscious indifference to consequences."

The foregoing propositions were decided and are the law of the case for the purposes of the second trial and this appeal because the evidence received at the two trials was substantially the same.

Appellants' Opening Brief has not questioned such sameness and it is not anticipated that it will be disputed. To point it out would unduly and unnecessarily prolong this brief. It may fairly be said that any new evidence presented in the second trial was cumulative. The same contract was produced; the same trapeze and net were involved; the same testimony was given by the same witnesses as to the same occurrence in which Olvera fell and was injured, except that the testimony of certain witnesses for both sides which was given at the first trial was read at the second trial in lieu of having such witnesses testify.[2]

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[2]Below is a list of the witnesses at both trials and references to their testimony by transcript citations in each trial:

PLAINTIFFS' WITNESSES

1st Trial	Transcript of Record No. 9594 (This Court) Pages
Cronin, Sylvester	337-338 inclusive
Johnson, Charles	563-569 "
LaBay, Philip	333
Lysaught, Jack	557
Miguel, Aristo	272-288 inclusive
Nelson, Bert	326-331 "
Pollinger, America Olvera	170-267 "
(Direct)	576
Pollinger, Karl	288-325 inclusive
(Direct)	575

DEFENDANTS' WITNESSES

1st Trial	Transcript of Record No. 9594 (This Court) Pages
Cronin, Sylvester	396-422 inclusive
LaBay, Philip	423-436 "
Matlock, William	532-542 "
Mentz, Howard	445-465 "
Miller, Chandler	508
Olvera, America	555
Thornton, Robert	382-389 inclusive
Valdo, Pat	351-382 "
Williams, George	474-493 "

9. That gross negligence was properly defined in defendants' requested instruction which read:

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The foregoing propositions were decided and are the law of the case for the purposes of the second trial and this appeal because the evidence received at the two trials was substantially the same.

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PLAINTIFFS' WITNESSES

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To avoid unnecessary repetition and volume in this brief it may be said that generally speaking the description of the nature and history of the case, set forth in the opening brief pages 1 to 5, inclusive, is correct, although it should be added that it was stipulated during the instant trial that the parties, plaintiff and defendants, to the contract in suit were related as independent contractor and contractee. It should also be pointed out the reversal of the judgment rendered in the first trial was based upon only one ground, to-wit, error of the court in refusing to give the instruction above described, otherwise appellant's assignments of errors were disapproved.

Under the caption "Statement of the Case" is set forth a purported condensed statement of the gist of the evidence, (Op. Br., pp. 6-13), with *some interspersed argument,* followed by a preview of points later argued and appellants' theories concerning them.

It is difficult to decide whether, in the interest of brevity, it is best to provide another statement of the case as to the gist of the evidence or to correct the numerous errors in such statement in appellants' brief.

As appellants' so-called "Statement of the Case" is so interspersed with specious argument, misstatement of fact and unwarranted conclusions we controvert his statement and submit the following as the Statement of the Case.

STATEMENT OF THE CASE

Plaintiff, America Olvera, was born June 8, 1906 at Mazatlan, Sinaloa, Mexico, and she is a Mexican National citizen. (Sup. Tr. of Record, pages 785 and 800.) Her family consisted of 16 brothers and sisters, father and mother, all aerial trapeze artists. (Pr. Tr. 147.) When six years of age she commenced her instructions from her father and thereafter continued her trapeze artistry until at the time of her accident she had become known as the world's premiere balancing trapeze artiste. Plaintiff had traveled and performed as a feature attraction for circuses and made public appearances throughout Mexico, United States, Central and and South America and Europe. (Pr. Tr., 147, 150, 151.) In 1933 she came to the United States, met Pat Valdo and was employed by (defendant) Ringling Bros. Circus. She was employed by and traveled with the Ringling Bros. Show from 1933 to 1936 performing the same act. On September 24, 1936, America had a conversation with Pat Valdo, personnel director of the Ringling Bros. Show. The contract, plaintiffs' Exhibit I dated September 24, 1936, and titled "Independent Contractors Agreement" between Ringling Bros.-Barnum and Bailey Combined Shows and America Olvera, was introduced in evidence. (Pr. Tr., p. 152.)

The following appears *verbatim* from the record:

"MR. COMBS: I offer to stipulate, your Honor, that by virtue of that particular contract

she was directed and sent by Pat Valdo, personnel director of Ringling Bros. Show, to Barnes' Show; that she was received there, and employed by that show under the terms of that contract.

MR. MARCUS: Not as an employee of the show.

MR. COMBS: Eliminate that phrase of the stipulation. (9) We will go that far with you. I meant to state that she worked for the Barnes Show under the terms of the contract.

THE COURT: Might it not be agreed that she was an independent contractor?

MR. COMBS: Yes.

MR. MARCUS: So stipulated, your Honor." (Pr. Tr., p. 152, 153.)

And again:

"Q. BY MR. MARCUS: You reported to San Diego did you for the Barnes' Show?

A. Yes.

MR. MARCUS: I presume there will be no objection to the letter going in evidence.

MR. COMBS: No objection.

MR. MARCUS: We offer this letter in evidence at this time.

THE COURT: What is the purpose?

MR. MARCUS: To show that she was directed to go there your Honor.

THE COURT: I don't believe Mr. Combs is making any point on that, are you, Mr. Combs?

MR. COMBS: *She was directed to go by Valdo and reported for the opening of the Barnes Show.*

THE COURT: And she was actually perform-

ing her act under her contract at the time of the accident? (19)

MR. COMBS: *Yes.*" (Pr. Tr., p. 161.)

The answers of the defendants disclose and admit that the entire stock of the defendants Ringling Bros. and defendant Barnes Shows were contracted and held by the *same identical voting trust.* (Pr. Tr., pp. 17, 18.)

The Board of Directors and Officers of both shows were interlocking. (Pr. Tr. 17-18.)

The evidence discloses that many acts engaged under contract by the Ringling Show were directed to render their services to the Barnes Show. (Pr. Tr. 408-409-410.)

Miss Olvera while rendering her services with the defendant Ringling was provided with a safety net by the show (Pr. Tr. 163) and was furnished a safety net when performing with Barnes and men to hold the net. (Pr. Tr. 165.)

Upon arriving at San Diego to begin her performances with Barnes—Cronin, the show manager, agreed to provide her with a safety net to be used during her performance (Pr. Tr. 163) and provided the men to hold the net. (Pr. Tr. 165.) These men were employed by the Barnes Show and paid by them. (Pr. Tr. 165.)

Her personal apparatus was delivered to the show employees at San Diego and at no time thereafter had possession of it during the season. (Rep. Tr. 168-169.)

The apparatus upon which Miss Olvera performed was erected and placed in position by the rigging men employees of the circus prior to the performance of Miss Olvera's act. (Pr. Tr. 179.)

The men holding the net were to move with Miss Olvera and watch her—"keep constantly the eyes on me." (Pr. Tr. 202.)

The purpose of a movable net is to watch the performer in the air, follow her movements and move the net with her performance so that in case of a fall the men can place the net so as to break the fall and catch the artist in safety. (Pr. Tr. 168-169, 202-203.)

Miss Olvera's rigging and equipment was erected and set up and maintained by the employees of the Barnes Circus. The main ropes, blocks and hooks were attached to the poles at the top of the main tent and were erected and hoisted when the big top was set up. (Pr. Tr. 213.)

Blackie Williamson was the supervisor of the rigging and rigging men all employed and paid by the show (defendant). (Pr. Tr. 170-202.)

The circus arrived in Anthony, Kansas, on September 12, 1937. Miss Olvera's rigging during the entire itinerary from San Diego was kept in a trunk in the possession of the employees of the circus together with the other equipment of the show. When she arrived at the show grounds for her performance the main top had been set up together with the two blocks and lines of

her rigging. The ropes were suspended from the main top of the tent. The balance of the equipment consisted of the upper and lower bar, the cross bar and the two bolts in the form of stars to hold the lower bar. This equipment was hoisted into position and rigged out by the employees of the defendant show during the show and immediately prior to Miss Olvera's performance. The two bars were under the main top approximately 35 feet above the ground. (Pr. Tr. 167-168; 178-179; 215-216.)

On September 12, 1937, Miss Olvera started her performance about 4 P. M. She entered the center ring and was assisted to her trapeze by her husband. (Pr. Tr. 172-182.) She immediately commenced her act which consisted of a series of balancing feats without touching the side lines; in this part of the act she swung the trapeze sideways and in a spiral motion. (Pr. Tr. 173.) The first part of her act took about 3 minutes. (Pr. Tr. 172.) At the same time there are two other acts in performance in the two adjoining rings on each side. (Pr. Tr. 172.) Toward the end of her act she began to swing the trapeze backward and forward while seated on the bar. Her fixed point of view so far during her act was a fixed object on the ground. (Pr. Tr. 215.) She had swung out about 4 feet (Pr. Tr. 212-213) and then began to rise on the trapeze. At that instant she changes her point of view to the crane bar at the top of the tent. At that instant she noticed the hook was overlapped. (Pr. Tr. 175;

212-213; 225-225); on the right side (Pr. Tr. 215-226) and becoming disengaged the right side of the trapeze dropped about 5 or 6 inches and threw Miss Olvera out of the trapeze to the right side. (Pr. Tr. 214-215.)

She then testified:

"Q. What did you do in order to save yourself?

A. I know how to fall, and I place myself to fall in the net.

Q. How did you do that?

A. I went out this way, with my head down, because I tried to reach with my hand this line to catch me, this arm. The slack of the hook wouldn't let me catch the line, and I went this way. So, knowing there was a net, I make myself in a group and I catch my knees and my hands, like that, the way we learned to fall into the net, and tried to pull myself like for a somersault, and not hit with my head in the net. I hit with my back in the ground; not in the net." (Pr. Tr. 176.)

She was in continuous performance from the time she entered the ring until her act was concluded. (Pr. Tr. 178.)

She then testified:

"Q. Do you know of your own knowledge whether or not this net moved at any time?

A. No, sir, it was not moved at all. I struck one of the men on the shoulder when I came down." (Pr. Tr. 180.)

On cross-examination Miss Olvera testified:

"Q. Will you please explain exactly what the men handling the net did when you made the swing backward and forward on your trapeze?

A. What they did?

Q. Yes.

A. They didn't do nothing.

Q. They stayed right where they were?

A. Right where they were.

Q. They never moved their feet?

A. No, sir." (Pr. Tr. 204.)

And again:

"Q. In fact, isn't it true that if they had moved the net underneath you, during each performance, it would have diverted your attention, and have been an annoying thing to you in the course of your performance, wouldn't it?

A. No, sir.

Q. Isn't it true that trapeze performers object to movement going on around underneath their trapeze during the performance?

A. I don't know what other trapeze performers do. I never did.

Q. How far from the outer end of the net did you fall?

A. Scarcely a foot out, sir.

Q. When you fell, I understand you struck the back of one of the men holding the net?

A. Yes, I did."

Mr. Pollinger testified:

He did not assist his wife in the performance of her act (Pr. Tr. 254) but simply helped pull her up on the trapeze to begin her act. (Pr. Tr. 255.)

"Q. Had you on any occasion taken any part in holding the net?

A. No, sir.

Q. Who were these men who did?

A. The net men from the show.

Q. Did you pay them?

A. No, I did not.

Q. Do you know who paid them for their services?

A. Yes.

Q. Who did?

A. The show paid them.

Q. What did these men do besides hold the net, to your knowledge?

A. I wouldn't know just what kind of work they did." (Pr. Tr. 258.)

When the trapeze threw her out he heard a metallic noise—like something broke. (Pr. Tr. 259.) That came from the trapeze. (Pr. Tr. 261.)

He observed the lower bar when he came in with his wife and it was perfectly level. He saw the lower bar of the trapeze after his wife fell and one side of the trapeze was 5 or 6 inches lower than the other. (Pr. Tr. 265.)

"Q. Did the men holding the net *move* at any time before your wife fell from the trapeze, until she struck the ground?

A. No, sir, most of them did not even observe she fell down.

Q. Answer the question: Did they move at any time from the moment your wife fell from the trapeze until she struck the ground?

A. No, they didn't.

Q. Did you move?

A. Yes, I did.

Q. What did you do?

A. I ran to catch my wife."

Miss Olvera was seriously injured and rendered a hopeless cripple for life, and to this date cannot even walk without the aid of crutches.

Ordinarily we would overlook the misstatements of fact in appellant's statement of the case and attribute them to overzealousness but when they go beyond the bounds of propriety and misquote the record we must comment on their authenticity.

On page 11 of his brief appellants say "the two shows were not in any way combined but were separate circuses and shows and each a complete entity itself.—The Ringling Bros Show in no way controlled, directed, paid salaries of or had any control over the employees and individuals representing and working for the Barnes Circus."

An examination of the answers will disclose the

interlocking directorate (Pr. Tr. 17-18) and admission that the entire stock of both defendants were owned, controlled and held by the same identical voting trust (Pr. Tr., 17-18), and the finding by this court on the former appeal, that—

> "Appellants admit that the stock control of both circuses was in a common trust, though each has an independent corporate existence. In connection with this admission there is evidence from which the jury properly could infer that Ringling placed Olvera with Barnes; that Barnes' Circus was one of 'its,' Ringling's Circuses within the meaning of the above agreement; that it was under the management of Ringling at the time Olvera received her injuries in one of Barnes' performances; and that they were caused by either the gross negligence or the ordinary negligence of Barnes' employees while so under Ringling's management."
>
> *Olvera vs. Barnes.* 119 Fed. 2nd 584.

And further the record discloses the following:

> "MR. COMBS: I offer to stipulate, your Honor, that by virtue of that particular contract she was directed and sent by Pat Valdo, personnel director of Ringling Bros. Show, to Barnes' Show; that she was received there, and employed by that show under the terms of that contract.
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> MR. MARCUS: Not as an employee of the show.
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to state that she worked for the Barnes Show under the terms of the contract.

THE COURT: Might it not be agreed that she was an independent contractor?

MR. COMBS: Yes.

MR. MARCUS: So stipulated, your Honor." (Pr. Tr. pp. 152-153.)

Again, on page 13, appellants brazenly and in disregard of the record state

> "Appellants were not lawfully informed in the amended pleading or *otherwise* until the actual trial was on, that any claim was made respecting the negligent use and operation of a net" . . ., etc.

An examination of the record of the first trial, the briefs on appeal, and the opinion of this court, will amply demonstrate even to the defendants that the net, its maintenance and operation was part of proceedings in this case for several years past. Quoting from this court's opinion we recite—

> "There was evidence from which the jury could infer that Barnes had assumed those incidents of Olvera's act which consisted of furnishing and 'maintaining' parts of its 'equipment' and 'apparatus,' *namely, the trapeze on which she performed and a net and persons to maintain it beneath her trapeze to catch her in safety in the event of an untimely fall; and that there was either gross* or *ordinary negligence in setting up and maintaining the trapeze whereby her fall was occasioned, and on the part of the net holders in*

> *failing to hold it under her, causing the injuries* and the *damages to her for which the jury gave its verdict.*"

His brief, on page 13, further states to this Court:

> "The negligence charged in the amended complaint was negligence in the erection, maintenance and setting up of *her* equipment."

Apparently appellants have not recently read the complaint, it recited—in paragraph VI:

> "That the defendants and each of them during all times during the rendition of the services by the plaintiff, pursuant to the terms of said contract *did provide, maintain and furnish the maintenance, set-up and erection of the equipment and apparatus used by plaintiff in the performance of her act as trapeze artist.*"

On the foregoing false premise he goes into a long dissertation that "there was no charge in the pleadings that appellants negligently maintained or operated a net . . . erroneous instructions were also given involving a net . . . a variance between and proof . . . *and instructions given to the effect that there was a modification of the contract* to the extent that a net was provided and used . . . " (Page 14 of Brief.)

These free and easy statements find absolutely no support in the record, none is cited and is spun from the whole cloth in a desperate effort to suggest error where none exists.

REPLY TO APPELLANT'S ARGUMENTS IN THEIR OPENING BRIEF

I.

THE EVIDENCE AMPLY SUSTAINS THE IMPLIED FINDING OF THE JURY THAT GROSS NEGLIGENCE OF DEFENDANTS WAS THE PROXIMATE CAUSE OF PLAINTIFF'S INJURIES.

In arguing their thesis, "there is no evidence of gross negligence or of wilful misconduct," etc. Respondents quote authority to the effect that the word "gross" is "without legal significance" and is "a mere epithet." *(Westre v. Chicago M. & St., etc., Co.,* 2 F. (2d) 227.) Also authority which approves a definition of "gross negligence" which includes the element of "wilfulness and wantonness." *(Seelig v. First Nat'l Bank,* 20 Fed. Supp. 61.)

Opposing counsel rely strongly on *Donnelly v. Southern Pac. Co.,* 18 Cal. (2d) 863. This decision fails to define "gross negligence," as it is regarded by California courts.

In fact there was no occasion for it to do so. It held that "the state courts are . . . bound by federal decisional law" in the field in which the Donnelly case belonged. Hence, the opinion sought to identify and isolate the federal law applicable to that case.

However, the Donnelly decision and the federal rule are equally irrelevant in this appeal.

If there is any proposition of law which was decided finally and beyond further dispute on the former appeal in this case it is this one. As a disputable question it is no more subject to change in this case than a law of God. Yet respondents attempt to attack and revamp it as the basis for numerous assignments of error among which are the claim that evidence is insufficient to sustain the verdict because "there is no evidence of gross negligence or wilful misconduct."

By associating "wilful misconduct" with "gross negligence" and then showing that the word "gross" is a mere epithet and that wilful misconduct is "wanton and malicious neglect" as the Donnelly decision implies it may be properly characterized, respondent in effect bursts into an undeclared war on the law of the case as it is and declared in *Ringling Bros., et al., v. Olvera, et al.,* 119 F. (2d) 584, which concludes:

> "We hold that the last cited provision of the Ringling-Olvera contract exempts the appellants from liability for their ordinary negligence and the court erred in refusing the requested instruction concerning their liability *solely for gross negligence.*" (Italics ours.)

This conclusion is based upon the common law as it is said to exist in Florida, and the opinion, quoting from 114 A. L. R. 1467 shows that under the common law relief "from liability for ordinary negligence" might be had by exempting clauses in such agreements as the one involved in the *Ringling Bros. v. Olvera case.*

Hence the entire discussion in Appellants' Opening Brief, pages 44 to 61 inclusive, is futile. It seeks merely to convince this court that the evidence is insufficient to support the verdict, because it is contended, there is "a total absence of the wanton, wilful, or intentional factor, and that "our release clause would still be effective" "as to the epithet type." (Op. Br., p. 50.)

Clearly opposing counsels' entire thesis in this portion of the brief is an adroit, devious but definite attack on the law of the case laid down by this court in the former appeal, wherein, as has been pointed out, it was held that "our release clause" would not be effective" because the common law in Florida only made it effective as against "ordinary negligence."

Also, since it cannot be denied that the evidence in the first and second trials did not differ materially the former decision establishes as the law of the case in the second trial and on this appeal that the evidence is sufficient to show that plaintiff's injuries were caused by "either the gross negligence or the ordinary negligence of Barnes' employees while so under Ringling management." (119 F. (2d) p. 585.)

Therefore, in order to relieve themselves of this judicial determination respondents must have shown that the evidence adduced at the second trial was materially weaker in its showing of negligence against the defendants than on the first trial. This the opening brief fails to do, and could not do.

THE DOCTRINE OF "LAW OF THE CASE"

The doctrine known as the law of the case is universally recognized and, as far as its applicability to questions herein involved is concerned, the law is well settled.

In *State of Kansas, ex rel. Beck, v. Occidental Life Ins. Co.,* 95 F. (2d) 935, 936, it is held that matters decided on appeal became the law of the case where substantially the same evidence is presented on a second trial as on the first and are the law of the case in the second trial and on appeal.

To the same effect are:

New York Life Ins. Co. v. Golightly, 94 F. (2d) 316, 319;

De Paroq v. Liggett & Myers T. Co., 81 F. (2d) 777, 779;

Claiborne-Reno Co. v. DuPont T. Co., 77 F. (2d) 565, 566;

U. S. v. Davis, 3 F. Supp. 97, 98;

Gordon v. Green, 66 Cal. App. 303, 25 Pac. (2d) 872;

Penn. Mining Co. v. United Mine Workers, etc., 28 F. (2d) 851, 853.

Rule recognized but evidence different in

Gritch v. Pickwick S. System, 27 Cal. App. (2d) 494;

Henslee v. Fox, (Cal. App.) 77 Pac. (2d) 307, 310.

EVEN THOUGH ON A SECOND APPEAL THE COURT BELIEVES THAT A RULE OF DECISION ANNOUNCED ON A FORMER APPEAL IS WRONG SO LONG AS THE FACTS ARE THE SAME THE PREVIOUS DECISION WILL BE FOLLOWED.

United States Gypsum Co. v. Columbia Cas. Co., 124 Fla. 633, 169 So. 532;

Lincoln Fire Ins. Co. v. Lilleback, (Fla.) 178 So. 394;

Claiborne-Reno Co. v. DuPont, etc., Co., supra;

Snoffer v. City of Los Angeles, 14 Cal. App. (2d) 650;

Gordon v. Green, 66 Cal. App. 650.

Several of the foregoing decisions hold that although the doctrine of law of the case is limited to questions of law, a determining factor is the similarity of the evidence, the material issues in the second case and in the first, and if on the former trial it is decided that the evidence requires a particular finding of fact or the application of a certain rule of law, its decision is law of the second trial and on appeal.

Among such decisions are:

Carpenter v. Durell, 90 F. (2d) 58;

Claiborne-Reno Co. v. Du Pont de Nemours Co., 77 F. (2d) 565;

New York Life Ins. Co. v. Golightly, 94 F. (2d) 316.

In the *Carpenter v. Durell* opinion it is said that the doctrine "is always applied where the former decision relates to the sufficiency or insufficiency of evidence."

Other cases where it was so applied are *New York Life Ins. Co. v. Golightly, supra,* and *De Paroq v. Liggett, etc., Co.,* 61 F. (2d) 777.

It follows that appellants are precluded from being heard in their contention that the evidence is insufficient to support the verdict because no evidence of gross negligence was adduced. This is the gist and substance of appellants' contention under Point I of the opening brief, although much superfluous argument is indulged in concerning appellants' definition of terms not to be found in the decision of the former appeal.

If the term "gross" is a mere meaningless epithet, as respondents contend, the terms "wanton and reckless" are mere meaningless epithets. No. 9 omits these epithets and gives the jury an understandable description of the meaning of the term "gross negligence" as distinguished from ordinary negligence.

Indeed, if the question were still open as to what the general common law is on this question reference need only be made to the cases[1] cited in the epochal decision in *Erie v. Tompkins,* to establish that under

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Note[1]—New York C. R. Co. v. Lockwood, 17 Wall. 367 21 L. ed. 627, 636; Liverpool & G. W. Steam Co. v. Phoenix Ins. Co., 129 U. S. 397, 32 L. ed. 788, 792; Eels v. St. Louis K. & N., etc., Co., 52 Fed. 903; Fowler v. Penn. R. Co., 229 Fed. 373.

the common law an exempting clause against negligence of any class was against public policy and void.

These or similar decisions were not placed before this court on the former appeal and respondent recognized during the second trial, through its proposed instruction and otherwise, and now submits without questioning the law, that the rule stated in the appellate court's decision and opinion on the former appeal which approves of the exemption from ordinary negligence, is the rule and standard to be met by plaintiff in this case.

DEFENDANTS' REQUESTED INSTRUCTIONS NOS. 9-A, 32 AND 33 WERE ERRONEOUS AND REPUGNANT TO THE LAW OF THE CASE. IT WOULD HAVE BEEN FLAGRANT ERROR IF THE COURT HAD GIVEN EITHER OF THEM.

9-A and 33 emphasize the terms "wilful" and "wilfulness," which is no part of the common law or the Florida concept of gross negligence. That element is not within the law of the case and these proposed instructions would impair and ignore the plaintiffs' substantial rights under the law of the case.

No. 32 is not substantially different from defendants' instruction No. 9 which was given.

II.

THE "SO-CALLED" PLAINTIFFS' INSTRUCTION 14-A WAS A CLEAR, CORRECT AND SOUND STATEMENT OF THE LAW AS DETERMINED IN THIS COURT'S DECISION ON THE FORMER APPEAL.

Disregarding as meaningless the epithet "so-called" which appellants apply to instruction No. 14-A, the opening brief challenges this instruction upon several grounds some of which are "incoherent and unintelligible" as criticisms of the instruction itself.

It is claimed that the defendants did not have an opportunity to examine the "redraft" until the jury had retired, and so were prevented from altering "their theory of the case."

After all, there is nothing new or startling in this instruction. It must be assumed that defense counsel were familiar with the evidence which had been received and to which the instruction applied, and with the opinion of this court rendered in the former appeal. Just how within the law laid down in that decision the defendant's theory might have been altered is not divulged; nor does the opening brief indicate what changes were made by the court in the instruction as proposed by plaintiffs' counsel. Consequently this complaint is unintelligible and quite incoherent.

Next the opening brief arbitrarily divides the instruction into "two sections, the first, dealing with the

subject of the apparatus and the second one-half thereof dealing with the subject of the net."

It is then said:

> "In the first one-half thereof the word 'or' in line 6 thereof makes it in the alternative and thus eliminates other pleaded defenses."

In truth, there is no such division into two sections in the instruction as it reads.

If upon any reasonable analytical basis a division into sections could be made, there would be three sections. The first would consist of the first seven lines. This much, as pertains to the apparatus and the net, is general. It is a prelude to the special reference to the trapeze and the net. This general section is connected with the others by the conjunction "and."

The word "or," whose use is criticized in the opening brief, by reason of its context plainly preserves the defense of "risks incident to the act" which plaintiff "had contracted to perform," just as it does the defense of unavoidable accident. Opposing counsel fail to name any other defense which, under the evidence, could possibly have been submitted to the jury. None existed.

The answers were in "formula" form. Every defense which is listed in the books as possible to be interposed in an action for personal injuries is set forth in these answers—some in more than one form.

The court is not required to instruct upon defenses which are excluded as a matter of law or because no evidence has been introduced in their support.

The epithet, "formula" attacked by respondents to this instruction, is not *anathema* in court instructions.

The general rule which only requires that the instructions as a whole correctly cover all questions involved for the jury's consideration and it is settled law that no single instruction, formula or otherwise, must state all of the rules governing the jury's arrival at a verdict.

Strangely the opening brief cites *Bee v. Tungsten Corp.*, 65 A. C. A. 1009, as holding to the contrary.

The opinion in that case declares:

> "The court carefully instructed the jury on all phases of the case and particularly on the law applicable to trespassers and invitees and the duty owed by defendant to each of them. The doctrine of assumption of risk was correctly explained to the jury. The court also instructed the jury that they were to consider all of the instructions together and as a whole and were to harmonize them so far as possible. It was not necessary for the court to state all of these rules in one instruction. Indeed, in some cases and this appears to be one of them the jury can be better informed by giving the instructions in several parts rather than by including many rules in one single instruction. Conceding, without deciding that the questioned instruction is to be classified as a formula instruc-

> tion, it is to be noted that in recent years the rigid rules formerly applicable to formula instructions have been greatly modified and where, as in the present case, the jury has been fairly and fully instructed and has not been misled or confused, a judgment should not be reversed because of the failure to include any one element in a formula instruction." (*Dawson v. Boyd,* 61 Cal. App. 2d 471, 483 [143 P. 2d 373].)

The other case relied upon in the opening brief as especially condemning formula instructions fails to support respondents' theory. The case is *Mazotta v. L. A. Ry. Co. and Finkelstein,* 25 A. C. 163. The trial court's order granting a new trial was sustained, but only on the theory that the Appellate Court will not reverse an order of the trial court granting a new trial unless it clearly appears that it has abused the wide discretion which trial courts are accorded in passing upon that question.

However, the formula instruction which was given in that case was plainly defective because it omitted two *essential elements of the plaintiff's case.* The suit was for damages for personal injuries and the Supreme Court says:

> "Certainly, to return a verdict against Finkelstein, the jury was required to find that he was negligent and that Jane Mazzotta was damaged as a proximate consequence of his conduct. Presumably the jury followed the challenged instruction although it does not include either of these issues and only loosely and incompletely touches upon the law of negligence."

The opinion also indicates that the formula instruction was to be treated under the following general rule:

> "Accordingly, it has been held that although an instruction may not include all of the factors essential to a recovery by the plaintiff, its use does not constitute prejudicial error where, considered together in their entirety, the instructions fully and fairly charge the jury with the law applicable to the case." *(Wells v. Lloyd,* 21 Cal. 2d, 452 [132 P. 2d 471]; *Westover v. City of Los Angeles,* 20 Cal. 2d 635 [128 P. 2d 350]; *Miner v. Dabney-Johnson Oil Corp.,* 219 Cal. 580 [28 P. 2d 23].)"

In both of the above cases the party complaining of a formula instruction was able to, and did, point out what essential element in the plaintiffs' case was omitted.

In this case appellants specify nothing except the defense of negligence of a fellow servant, which defense, the opening brief, on the following page (p. 67), admits was not available in this case. Thus their omnibus complaint which merely asserts a rule and makes no genuine pretense to show its applicability is unintelligible.

In the instant trial the court gave several instructions requested by the defendants by which the jury were repeatedly limited to gross negligence on the part of the defendants as the basis for a verdict against them.

"Defendants' Instruction No. 11" reads:

"You are instructed that if you find defendants were guilty only of ordinary negligence in relation to the plaintiff in this case and were not guilty of gross negligence towards her, you must find for the defendants in this action.

Given.

C. E. Beaumont,
Judge."

"Defendants' Instruction No. 26" reads:

"The burden is upon the plaintiff to prove by a preponderance of the evidence that the defendants were grossly negligent and that such gross negligence was a proximate cause of injury to the plaintiff.

Given.

C. E. Beaumont,
Judge."

"Defendants' Instruction No. 31" contains a statement similar to Instruction No. 11, and "Defendants' Instruction No. 9" follows the rule laid down by this court in the former appeal, almost verbatim.

The court also gave defendants instructions which fully informed the jury that it must return a verdict for the defendants if it found that plaintiff's negligence proximately contributed to her injury.

"Defendants' Instruction No. 2" reads:

"If the jury find from the evidence that the

plaintiff herself was careless or negligent at the time and place of the accident, and that such negligence proximately contributed to the injury which she sustained, then the plaintiff cannot recover damages in this case and your verdict should be for the defendants.

Given.

C. E. Beaumont,
Judge."

"Defendants' Instruction No. 27" is to the same effect. (Tr., p. 76.)

Hence, even under appellants' own cited decisions the so-called "Plaintiffs' Instruction No. 14-A" is not subject to attack.

Again, it is appellants' claim that they were misled and "withdrew certain instructions on the fellow servant rule." (Op. Br., p. 65.) Yet, in the next breath (Op. Br., p. 66), it is said "fortunately . . . defendants as an excess of caution, had left three master and servant instructions in the record."

It is submitted that the second statement belies the first. "Actions speak louder than words." Opposing counsel either relied upon the "statements and representations" as they claim or they did not rely upon them. The alleged "excess of caution" proved the latter alternative to be true and the former false.

However, on the following page of the opening brief (p. 67), it is admitted defendants were "precluded" from using "other defenses relating to the

master and servant or employer and employee, such as the 'fellow servant' rule."

Like a tumbleweed on a prairie the opening brief is thus directed by any wind that blows and in its veering course crosses itself up and shows that Instruction 14-A omitted no defense theory which was legally available to the defendants.

The further attack upon instruction, Plaintiffs' No. 14-A, "so-called" by which respondents assert that it directed the jury to return a verdict for the plaintiffs if it "found alone the fact that defendants failed to catch the plaintiff in safety," is refuted by the language of the instruction itself.

It is puerile to argue that

> "This instruction had the additional vice of opening the case on ordinary negligence."

No language in said instruction even hints that the jury might return a verdict based on a finding of ordinary negligence. The words "gross" or "grossly" precedes the words "negligence" and "negligent" throughout the instruction, except in the portion which deals with contributary negligence.

Nowhere in this instruction is there language which in any way suggests that

> "There was a modification of the contract pulling the net phase out of the exemption clause against negligence."

Respondents fail to point out such language but dogmatically make the above quoted assertion, apparently reserving a specific and answerable argument for the closing brief. Upon this unwarranted premise appellants suggest that "this reopened the case on ordinary negligence in violation of the law of this very case." The wish must have been father to this thought because it has no other father. Nothing in Instruction No. 14-A warrants the series of unexplained assertions set forth on page 63 and the first paragraph of page 64 of the opening brief.

The Sufficiency of the Evidence

It will not be our purpose to argue the question presented by appellants' as to the sufficiency of the evidence at length, since the law of the case, as above pointed out, renders it unnecessary.

Were Appellants' Agents Negligent?

Opposing counsel, in a last stand flurry of desperation, attempt to show that the men holding the net had no time to do anything but remain stationary. They declare that only a little over a second was consumed in her fall because, it is said, "a stationary object falls 16 feet the first second." (Op. Br. 58.) Ergo, it was a waste of manpower and money to employ men to hold the net. Eight or ten posts would have served the purpose as well. It was absurd, if counsel is correct, to expect men to ever save the artist unless she took care to dive into the net.

Of course, they were required to use some intelligence and a modicum of skill.

Besides, according to respondent's purported logic a feather, starting from the stationary, would fall the first 16 feet in exactly the same time, to-wit, one second as a thousand pounds of iron. Ergo, again the respondent, fell twenty feet in a little over one second.

Opposing counsel in pages 53 to 61 inclusive of their brief, in their attempt to show that their agents were not negligent, even in the slightest degree, and that respondent brought her injuries on herself, give the court their opinion on matter of skill and science, matters involving a technical knowledge of general mechanics, the motion and course of swinging bars, the effect of forward and backward and sideway swings, the balancing of the forces thus created, etc., etc. Respondent counsel leaves these matters and the entire argument, made up and premised upon this gratuitous opinion evidence of counsel who might well have saved their client's cause had they been first sworn and testified and allowed the issues to have been determined by the jury with the benefit of their so-called expert opinion.

We leave it with the court without comment but with the utmost assurance that the findings of the jury whose province it was *to weigh the evidence* in the record, will not be disturbed.

In a recent well considered decision of the Supreme Court of California the question as to whether or not

the plaintiff was furnished a reasonably safe place to work and whether there was evidence that the defendant was negligent in failing to provide such reasonably safe place, we quote the decision of *Spencer v. Beadle, S. S. Co.,* 48 Pac. 2nd, 678 at 680 wherein Justice Schenck made the following pertinent observation:

> "The important issue was whether the plaintiff was furnished a reasonably safe place to work and whether there was evidence that the defendant was negligent in failing to provide such a reasonably safe place. The question was submitted to the Jury on that basis, and we see no prejudicial error in the refusal of the Court specifically to instruct the jury as to whether the plaintiff had assumed the risk. The effect of the instructions as given was to place liability on the defendant only if a reasonably safe place was not provided, and there was negligence in failing to make such provision."

The verdict of the jury was in favor of the plaintiff.

The following language is particularly applicable to the instant case, we quote:

> "It is also well settled that under the federal statutes an employee does not assume the risk of the defendant's negligent failure to provide a safe place to work. Seaboard Air Line Ry. v. Horton, supra; States S. S. Co. v. Berglann, supra; Ziegler v. Alaska Portland Packers' Assn., supra; The

Kongosan Maru (D. C.) 282 F. 666; Engfors v. Nelson S. S. Co., supra. *The rule of assumption of risk presupposes that the employer has performed the duty of caution, care and vigilance which the law casts upon him, Cincinnati, N. O. & T. P. Ry. Co. v. Hall (C. C. A.) 243 F. 76, 81.*"

Under subheading (b) "Review of the Facts Showing There Was No Evidence to Support the Verdict," the appellants instead of quoting the evidence from the record and let this Honorable Court again indicate its views on the matter argues conclusions reached by his own interpretation as to what he believes the result of the testimony indicates viz on page 54 of his brief he recites:

> "She (plaintiff), herself, was confused as to what took place. First she said that she saw the figure eight hook *actually in the process* of overlapping when she looked up at the instant of the peak of her swing just before her fall. (Pr. Tr., p. 17, lines 19-31.) Later she said that she did not know when the hook overlapped. (Pr. Tr., p. 215, lines 9-12.)"

Such is not the effect of her testimony and we submit the record. Remember, Miss Olvera was born in Mexico and the record discloses her inability to speak fluent English.

Again under the same point of discussion he waxes eloquent by giving his scientific expert opinion by stating "it is a matter of mathematical or physical

calculation that when she swung forward and back and the side with the long line would swing out *slightly* ahead of the other." (Op. Br., p. 54.) We respectfully say we "don't believe it" particularly when both ends of the line are perfectly level and joined together with a bar with the weight of a performer upon it. Counsel then says and assigns his expert scientific reason for this as follows—"The reason for this is that the arc or portion of circle described by a certain radius will be longer than that described by a shorter radius . . . " etc. (Op. Br., p. 54.) Where does counsel find authority for his so-called scientific, voluntary, extra judicial hearsay opinion? We have searched the record. None is found and no citation referred to. This Court certainly would not take judicial knowledge of such *pseudo* scientific unsworn theories outside the record, when none is found within its covers. There is no evidence in the record that at the time Miss Olvera was performing her act and prior to her fall that one line was longer than the other. There is testimony that the lower bar upon which she performed was level until the eighth hook which was overlapped became unloosened, snapped down and dropped one side of the trapeze throwing Miss Olvera out. Many witnesses saw the uneven trapeze after she fell, and heard the clang of the overlapping metal hook come loose dropping the trapeze. Yet counsel says "cross-examination conclusively establishes this to be impossible." (Op. Br., p. 57.) Why? Where? and How? Then elucidates this by

referring to the condition as "fantastic" (Op. Br. 57) and concludes by saying—"Plaintiff's claim is too improbable to be worthy of any consideration." Well twelve jurors did not think so. This appellate court in its first opinion believed there was evidence from which the jury could infer *gross negligence;* the second trial jury believed that the defendants were guilty of gross negligence. The trial judge passed upon the same question—yet counsel for appellants are not convinced. Where was the net at the time of her fall? Every witness who testified concerning the net and the employees of the defendants holding the net said not one moved in the slightest degree. We might add parenthetically that Miss Olvera should have been more careful in falling so as to avoid striking the men holding the net—for she struck one of defendants' netmen on the shoulder, before reaching the ground. If he had even seen her fall he might have jumped out of the way to avoid injury to himself. That net was there for a purpose. The employment was hazardous. The net was held by men whose duty it was to "catch her in safety," move the net when movement was necessary not stand glued to the ground and oblivious to their purpose and duty.

The record is complete and amply sustains the jury's finding of defendants' gross negligence.

Under his subheading (a) "Review of Law on Gross Negligence and Wilful Misconduct," page 44 of his brief, he alleges on page 46:

"The lack of pleading gross negligence or facts which would constitute gross negligence was urged upon the District Court on their motion to dismiss the amended complaint, as not stating a legal claim upon which relief could be granted. That this was a fatal defect under the laws of California (forum) we submit the following authorities:"

He then cites

19 Cal. Jur. 676, Sec. 100-pt. 11;

Michaletschke Bros. v. Wells Fargo et al., 50 Pac. 847; 118 Cal. 683;

Nichols v. Smith, 28 Pac. 2nd 693; 136 Cal. App. 272.

Apparently the allegations of the complaint as found on pages 10 and 11 in paragraphs VIII and IX of Pr. Tr. have again escaped appellant's observation. All allegations of defendants' negligence are alleged as "grossly negligent" . . . "gross negligence" . . . and "gross negligence and carelessness."

Let us again remind appellant the revised rules of Federal Procedure have greatly altered the forms of pleading in the Federal Courts—(all cases cited by appellant respecting the manner and form of pleading are under California procedure and California cases). We shall briefly review this matter though as we do not desire to leave unanswered any suggestion of seeming error suggested by appellants.

It will be noted that the charges alleged in the complaint set forth in Paragraph VIII referring to the erection maintenance and set up of the said equipment referred to in Paragraph V was the maintenance, set up and erection of the equipment and apparatus, "used by plaintiff." The evidence disclosed that the equipment which included the net had been furnished by the defendants and used by the plaintiff in the performance of her act since the beginning of the rendition of her services with the defendant, Barnes Show, some five months previous to the date of the accident.

Paragraph VI of plaintiff's complaint does not limit the allegations to plaintiff's equipment, but in addition included the equipment and apparatus "used by plaintiff."

The revised rules of Federal procedure with which defendants no doubt are acquainted but have failed to cite under this point and the late citations of authority which may be found under this rule leaves this point without any semblance of merit.

Rule 8 of the Rules of Civil Procedure for the District Court of the United States with which we shall not burden this Court by quoting provides for a short and simple statement of the claim showing that the pleader is entitled to relief.

The allegations of the complaint meet this rule. See *McLead v. Cohen Ericks Corp.,* U. S. Dist. Court S. D. N. Y. April 27, 1939—28 Fed. Supp. 103. The following cited authorities are directly in point and substan-

tiate the form of plaintiff's complaint and manner of pleading.

Sierocinki v. E. I. DuPont de Nemours & Co., 103 Fed. (2) 843;

Hardin v. Industrial Motor Freight System Inc., 26 Fed. Supp. 97;

Satink v. Township of Holland, 28 Fed. Supp. 67.

See also Vol. I, Fed. Rule Service, pages 51-71.

In the *Sierocinski case, supra,* the third circuit court through Judge Beadle in interpreting rule 8 observed:

"A plaintiff need not plead evidence. He 'sets forth a claim for relief' when he makes 'a short and plain statement of the claim showing that the pleader is entitled to relief (Rule 8 (a) (2)).' The same rule, (e) (1), requires that 'each averment of a pleading shall be simple, concise, and direct. No technical forms of pleading or motions are required;' and (f) 'all pleadings shall be so construed as to do substantial justice.' Form 9 in the Appendix of forms attached to Rules, 'intended to indicate . . . the simplicity and brevity of statement which the rules contemplate (Rule 84),' contains this concise allegation of negligence: 'defendant negligently drove a motor vehicle against plaintiff who was then crossing said highway.' If defendant needs further information to prepare its defense it can obtain it by interrogatories (Rule 33)."

In the *Satink v. Holland case* the Court struck out particular allegations as not conforming to the rules and observed:

> "The Rules of Civil Procedure provide as follows: 'Each averment of a pleading shall be simple, concise and direct. . . . ' Rule 8 (e) (1), 28 U. S. C. A. following section 723c. With regard to the allegation of prior notice the objection is without merit. However, the complaint unnecessarily elaborates in this allegation to the extent that it invades the prohibition against the averment of evidentiary facts."

In the *Minnesota case, supra,* the Court said:

> "Counsel for the defendant argues at length upon the insufficiency of the allegations, being based upon conclusions rather than facts, to state a cause of action. The requirements of a pleading are substantially set forth in Rules 8 (a) (1-3); (e) (1, 2), and 9 (b), Federal Rules of Civil Procedure.
>
> Equity Rule 25, 28, U. S. C. following section 723, required: 'A short and simple statement of the ultimate facts upon which plaintiff asks relief, omitting any mere statement of evidence.' In speaking of the change effected by the new rules, Moore says in his Federal Practice Vol. 1, page 553: 'The federal courts are not hampered by the morass of decisions as to whether a particular allegation is one of fact, evidence or law.' "

Defendants complain that the Court committed error in instructing the jury upon the question of a net

for the reason that it was not within the issues framed by the pleadings and at variance thereto. Not one item of equipment or apparatus is mentioned, nor the details of construction set forth, nor the manner in which the accident occurred. In interpreting the rules the Appellate Courts where details and evidentiary matter elaborate the pleadings, have stricken such portion of the pleadings as not conforming to the new rules of procedure. (See cited authorities supra.)

III.

THE INDEPENDENT CONTRACTOR ISSUE MUST BE DETERMINED BY THE LAW OF FLORIDA AND BY THE LAW OF THE CASE.

The caption to appellant's Point III contains a statement of opposing Counsel's conception and theory of the duties of contractor and contractee in cases where the person rendering services to another does so as an independent contractor. This is entirely proper.

However, when this caption is followed by the statement "We agreed to this statement of facts (Pr. Tr., p. 153, lines 9-12)," although no such agreement is to be found on the cited page or elsewhere in the record, propriety is ended, and respondent's patience ceases to be a virtue.

The only stipulation made was that plaintiff was an independent contractor. (Pr. Tr., p. 153.)

Under this heading of "Independent contractor" defendants have promulgated a purported rule of law, argued their position from such rule and in conclusion have boldly challenged the plaintiffs—"to cite any recognized authority showing facts where an independent contractor recovered damages for injuries cause by unsafe premises. . . . " (A. O. B., p. 72.)

One should not glibly make such bold challenges. This challenge is gladly accepted, and fortunately the cited opinions are both from the states of Kansas and California. In *Brossius v. Orpheum Theatre Co.,* 60 Pacific Reporter Second, page 156, the Court said:

> "The trial was before the court without a jury. The Court made a personal inspection of the premises and upon the conclusion of the trial found that the defendants were guilty of negligence. These findings are now attacked. Defendants owed the plaintiffs the duty of using reasonable care in soliciting and maintaining safe the apparatus for his use. The question whether defendant discharged this duty was for the determination of the trial Court. There is sufficient evidence in this record to sustain the findings of the Court on the issues of negligence and contributory negligence."

In the case of *Isnard v. Edgar,* 81 Kansas Reports, page 765, the Kansas Court made the following significant observation:

> "Whether the court in its assumption that the deceased was an employee of the appellant was

technically correct or not, we do not deem it necessary to decide. *The obligation of the appellant to furnish a safe place for the deceased and his assistants to work was the same whether the deceased be regarded as an independent contractor or as an employee.*"

The language used by the Supreme Court of California in *Spencer v. Beadle,* 48 Pac. 2nd 680, is again applicable:

> "The important issue was whether the plaintiff was furnished a reasonably safe place to work and whether there was evidence that the defendant was negligent in failing to provide such a reasonably safe place. The question was submitted to the jury on that basis, and we see no prejudicial error in the refusal of the Court specifically to instruct the jury as to whether the plaintiff had assumed the risk. The effect of the instructions as given was to place liability on the defendant only if a reasonably safe place was not provided, and there was negligence in failing to make such provision."

The verdict of the jury was in favor of the plaintiff.

The following language is particularly applicable to the instant case, we quote:

> "It is also well settled that under the federal statutes an employee does not assume the risk of the defendant's negligent failure to provide a safe place to work. Seaboard Air Line Ry. v. Horton, supra; States S. S. Co. v. Berglann, supra; Ziegler v. Alaska Portland Packers' Assn., supra; The

Kongosan Maru (D. C.) 282 F. 666; Engfors v. Nelson S. S. Co., supra. *The rule of assumption of risk presupposes that the employer has performed the duty of caution, care and vigilance which the law casts upon him. Cincinnati, N. O. & T. P. Ry. Co. v. Hall (C. C. A.) 243 F. 76, 81.*"

See also:

Barclay v. Puget Sound Lumber Co., 48 Wash. 241;

Neimayer v. Weyenhaeser, 95 Iowa 497;

Johnson v. Spear, 76 Mich. 139;

Coughtry v. Globe Woolen Co., 556 N. Y. 124.

If any confusion exists on this point it can be found in the jumble of cases which defendant has cited to this Court. Appellants have actually contended and this contrary to all the evidence, that "the only question here is gross negligence relating to the erection of appliances used by plaintiff *and owned and controlled by plaintiff, to-wit: the trapeze, rigging or apparatus, and gross negligence in the operation of a net.* The plaintiff strenuously urged at the trial that the net was a part of her apparatus or equipment." To support this unwarranted remark they cite Printed Transcript, page 163. An examination of this page of the Transcript fails to disclose any such contention.

Miss Olvera testified that she was furnished a net with the Ringling Show since the year 1935 and that the defendants Barnes continued to supply her with

such net for the year 1937. Having undertaken to provide and having so provided this safety appliance to plaintiff for a period of three years continuously prior to the date of her injury, it does not come with good grace after plaintiff has been injured by reason of defendants' negligence in improperly maintaining this equipment to say that " . . . if the net were a part of the apparatus or equipment used by the plaintiff, the net would fall within the provision of contract relating to plaintiff's duty to furnish and maintain the equipment." (O. B., p. 69.) Miss Olvera at no time furnished a net nor maintained a net. The evidence is conclusive that the show furnished, supplied, operated and maintained this safety appliance, and *erected* and set up the trapeze and equipment *used* by her while rendering her performance.

Appellants base their entire contention under this point upon Kansas decisions on the theory that the law of Kansas controls as the *locus delicti.*

This theory overlooks or attempts to hurdle two insurmountable obstacles:

1. The provision of the contract heretofore quoted which stipulates that "all matters whether sounding in contract or in tort, relating to the construction, interpretation and enforcement of this contract shall be controlled by the law of Florida." This stipulation is recited in the former opinion, and it was held that it was competent for the parties to "agree and fix the law controlling all the liabilities and obligations" of

the parties under the contract, "even if the law of the forum is different."

2. Hence, it was held that the law of Florida must be observed in determining the liability of appellants herein and the extent to which they could be exempted, even by contract, for their negligence, whereby such negligence the respondent herein was or might be injured.

The rule which the former opinion laid down was the rule which appellants advocated and the judgment appealed from was reversed because of the trial court's refusal to give an instruction in which said rule was embodied.

The facts pertinent to the question now argued by appellants were then before the Court of Appeal. The provisions of the contract which appellants contend make respondent an independent contractor are set forth in the opinion and the facts pertaining to the net and the trapeze are related therein.

Yet this court upheld appellants in their contention that their proffered instruction correctly stated the applicable law and that instruction read:

> "Instruction No. 1-A. You are instructed that the burden of proving her case rests upon the plaintiff, and that in order to recover against the defendants, or either of them, the plaintiff must establish by preponderance of the evidence that said defendants were guilty of gross negligence and that such negligence on the part of the defend-

ant was a direct and proximate cause of the injury to the plaintiff.

"Gross negligence is different from and greater than ordinary negligence. Gross negligence has been defined as want of slight diligence, as an entire failure to exercise care, or the exercise of so slight a degree of care as to justify the belief that there was an indifference to the things and welfare of others, and as that want of care which would raise a presumption of the conscious indifference to consequences."

Obedient to the ruling of this court, in the last trial, this same instruction was given at the defendants' request.

Now, as appellants, they ask this court to hold that said instruction was erroneous; that some other instructions or counter instructions should have been given on the same question characteristically of the opening brief, it does not quote or identify any such other instructions or inform this court what counter instructions might properly have been asked, but it must be assumed that they would have modified or superseded their instruction which is the same as the one above quoted, otherwise, and if the unidentified instructions would not have affected said instruction which was given, obviously, appellants were not hurt.

Respondent insists that the law pronounced on the former appeal bars respondents' entire thesis as it is set forth in their Point III.

It is true that the opinion in the first appeal does not expressly state that in deciding the questions which are therein passed upon consideration was given to the relationship of contractor and contractee between the parties and the duties and liabilities arising from that relationship, yet, appellants' briefs on that appeal urged, just as they do now, that such relationship existed and that a contractee owes no duty other than to refrain from wilful injury, if the contractor is to furnish and inspect his own equipment.

This being the situation and the history of this case the doctrine of law of the case is applicable.

This rule is declared in the Claiborne-Reno Company decision where it is said:

> "Again in their former brief counsel for appellant said: 'The various considerations paid by the appellee included the purchase and maintaining of a stock.' Other references are made in the brief to the fact that among the considerations moving appellee to enter into this agreement was 'the purchase of a stock of Duco.'
>
> True, the point that this purchase was the consideration for this contract was not on the former trial below or on the hearing in this court then stressed with the vehemence now here present. But it was in the case. If it was not then so prominently put forward as to attract the attention of this court and demand specific treatment, those things do not detract one iota of vigor from the law of the case rule, for, if this court had overlooked the potency of the point, in the opinion

filed the matter should have been called to its attention by a motion for a rehearing. A very similar situation arose in this court in the case of Mortgage Loan Co. v. Livingston, 66 F. (2d) 636, loc. cit. 640, wherein the above practice is suggested as necessary in a case wherein it was contended that this court overlooked vital and controlling facts in the record, on the first appeal.

We have carefully examined the record and briefs on the former appeal in order to ascertain whether there are any such substantial differences in the facts as should move this court to refrain from applying to this appeal the rule of the law of the case. We have found none such."

Respondent asserts that the framework and substance of appellants' entire thesis in their Point III is trivial and sham.

Plaintiffs' instruction 14-A clearly limits the plaintiff's right to recover to proof of gross negligence on the part of the defendants. It does not, in effect, or otherwise, "direct that there was a modification of the contract" in any respect.

Appellants fail to quote any language to that effect and their mere assertion amounts to nothing.

The repeated palaver about the defendants being given no opportunity to present counter instructions, (Op. Br., p. 64, and again on pp. 65, 66), is not only sham but misleading. This is demonstrated by the discussion between the court and Mr. Coombs on the

hearing of defendants' motion to set aside the verdict and for a new trial.

The trial judge at that time asserted and Mr. Coombs admitted that before the court drafted and gave said instruction 14-A, a long conference was held by the court with counsel on both sides in which the subject matter of this instruction was fully presented by Mr. Coombs and Mr. Corkery, defense counsel, and the court expressed its views very clearly and in the end stated that it would go over the instructions and would itself draft an instruction along the lines of 14-A.[1] (Supp. Tr., pp. 764-768.)

Appellants' complaint that they were misled because it was understood that the case was to be tried "on the theory of gross negligence and on the theory of independent contractor" and so withdrew instructions on the master and servant rule, is likewise shown and false.

The case was tried upon said theories. By said instruction 14-A and Defendants' Instruction No. 9, the theory of gross negligence was given strict adherence, and the court, at defendants' request so told the jury. (R. Tr., p. 63.)

The only confusion or near departures from said theories was caused by defendants' continual attempts to interject the master and servant rule and other defenses which were legally utterly alien to any issue herein involved.

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[1]This matter will be elucidated further in refuting charges of bias and prejudice, *ante*, Point VII.

POINT IV.

The reply to Appellants' Point IV will probably be given more space than it deserves. However, each of the reasons from which it results that the entire argument presented under the caption, "Assumption of Risk" is fallacious, will be set forth with brevity.

They are as follows:

1. The former decision determined that the law of Florida, and not that of Kansas, controls in "all matters whether sounding in contract or in tort relating to the validity, construction, interpretation and enforcement" of the instant contract. This, the contract, itself expressly provides.

2. The Kansas cases quoted in the Opening Brief to support the contention that "The law of Kansas has always recognized the defense of assumption of risk in cases of negligence involving master and servant."

3. The cases cited by appellants are all purely *master and servant* cases. They, therefore, are inapplicable where an independent contractor sues the contractee of injuries resulting from the contractee's negligence. (*Lester v. Graham,* 157 App. Div. 651, 142 N. Y. Supp. 739.)

4. Where the employer provides a portion of the equipment and directs the contractor to use and the contractor acquiesces and uses such equipment which proves defective, the employer is liable for resulting injury of the contractor. (*Gammage v. Internat'l*

Agri. Corp., 268 Fed. 246; *Arizona etc. Copper Co. v. Dickson,* 22 Ariz. 163, 195 Pac. 538; 14 R. C. L. 81.)

5. Appellant's own brief admits that the stipulation heretofore pointed out, that the relation of independent contractor and contractee existed between the parties "precluded defendants from using other defenses . . . relating to master and servant or employer and employee, such as the fellow servant rule." (Op. Br., p. 67.)

6. On the former appeal appellants' herein argued as a ground for reversal that the doctrine of assumption of risk was applicable and presented this assignment earnestly and under a separate caption.

Hence, *it is included in the law of the case as announced in the former decision.*

7. The Florida law holds that the doctrine of assumption of risk, generally applies to controversies between master and servant only.

City of Jacksonville Beach v. Jones, 101 Fla. 96;

City of Jacksonville Beach v. Keller, 102 Fla. 273.

The same decision holds that where this defense does not rest on a contract of employment, it must rest on an act done spontaneously, rendering the party doing it a volunteer.

Respondent was not a servant, and she certainly was not a volunteer.

Defendants have framed their argument upon a false premise of fact. They argue "where employees of the contractee *assisted independent contractor* in arranging her apparatus prior to her performance on same, any plain and obvious defects in the arrangement of the apparatus should have been observed and appreciated by the independent contractor under her contractual duty of inspection where independent contractor could qualify as an expert in such matters, and any defect such as claimed by plaintiff should have been observed, and the Court erred in refusing to give the defendants' requested instruction on this point." (A. O. B., p. 74.) This statement is contrary to the weight of the evidence the verdict of the jury and made without reference to or support from any citation of evidence. In effect it asks the court to believe defendants' witnesses and disbelieve plaintiff's, contrary to the verdict, and as such is an argument on the jury's determination of a disputed question of fact. Where is there any evidence anywhere in the record that plaintiff set up or erected her rigging or that defendants' employees "assisted" her in such endeavor? Plaintiff's testimony supported by other witnesses, discloses that she at no time erected or set up her rigging or equipment. This service had been undertaken by the defendants, Al G. Barnes Circus and Ringling Bros. Barnum and Bailey Show and had been provided plaintiff since her initial contract with Ringling Bros. Show in 1934. The assumption therefore by appellants that the "contractee assisted the independent contractor in arranging her apparatus prior to her performance" is without support in the evidence. What

appellants sought to convey by suggesting that defendants' employees "assisted independent contractor in arranging her apparatus" we can only venture a surmise. "Arranging" the apparatus might suggest setting up and erecting the rigging to defendants, but it has not confused plaintiff and we believe this court will not be misled by the play on words.

The contract provided that " . . . artist for himself and the personnel of his troop accepts all risks incident to the business." (Paragraph 12 of the contract) and is a part of the much discussed exemption provision on this subject. The Court gave the following instructions:

> "In this case if you believe from the evidence that the plaintiff at or before the time of the injury knew and appreciated the danger and peril of the work in which she was engaged at the time of the injury and understood the same, and then chose to engage in the work which exposed her to such perils and danger, she cannot recover if her injuries were caused by such danger and peril, and in determining the question whether or not the plaintiff knew, appreciated and understood the perils and danger of the work in which she was engaged, you will consider the evidence as the plaintiff's age and mentality, and as to her previous experience with a trapeze or similar apparatus, and all other evidence bearing upon said issue.
>
> **Given.**
>
> C. E. Beaumont,
> Judge.

Parker vs. Wichita, 92 Pac. (2) 86; 150 Kan. 249;

Fritchman vs. Chetwood Battery Co., 8 Pac. (2) 368 (Kans.)

Ringling Bros. vs. Olvera, 119 Fed. (2) 584."

"The mere fact that an accident happened, considered alone, does not support an inference that some party, or any party to this action was negligent. In law we recognize what is termed an unavoidable or inevitable accident. These terms do not mean literally that it was not possible for such an accident to be avoided. They simply denote an accident that occurred without having been proximately caused by negligence. Even if such an accident could have been avoided by the exercise of exceptional foresight, skill or caution, still, no one may be held liable for injuries resulting from it. Both negligence and proximate cause, as defined in these instructions, are requisites for founding liability.

Given.

C. E. Beaumont,
Judge.

California Jury Instructions (Civil) 63 and 62 as adopted for use in the Superior Court of Los Angeles County, California.

G. [85]."

"I instruct you if you find that it was the duty of plaintiff under her written contract to supervise and inspect the erection of the apparatus used by her in her act, or that she did so supervise or inspect said apparatus prior to the use of same at

the time of her accident and that there was a defect in said apparatus which was the proximate cause of her fall, and if you find that plaintiff could or should have known of such defect if she had exercised ordinary care and prudence and had the experience and intelligence to appreciate the danger, then you will find for the defendants upon the question of gross negligence insofar as the erection and placing in position of plaintiff's apparatus is concerned.

Given as modified.

C. E. Beaumont,
Judge.

Fritchman vs. Chetwood Battery Co., 8 Pac. (2) 368 (Kans.);

Barnes vs. Akins, 166 Pac. 474 (Kans.) [71]."

The requested instruction which the defendants claim the court failed to give appearing on page 79 and 80 of their brief, *is not a correct or proper statement of the law.* The instructions given by the Court as before enumerated and as found on pages 48 to 80, Pr. Tr., contain a correct statement of the law on the question of assumption of risk as the following authorities will disclose.

The theory of assumption of risk has universally arisen from the relationship of master and servant. The risks usually assumed by a servant are those ordinarily incident to his discharge of the duties in the particular employment. Because of the close association of the doctrine of assumption of risk and con-

tributory negligence it is difficult to draw a true line of distinction. (39 Corpus Juris., Page 684.)

It has been recognized as a universal proposition of law that "risks arising from the negligence of the master or those representing him are extraordinary risks not incident to the employment." This rule of law has been long recognized and appears to be universal. The words of the contract that "plaintiff accepted all risks incident to the business" are the words of the contract and defendants' argument that the contractual obligation and the common law liability call for a different instruction falls by comparison.

The following quotation is cited in the text of Corpus Juris and supported by decisions from all jurisdictions of the United States:

> "Risks which arise from the negligence of the master or those representing him are not 'ordinary risks' incident to the employment, but are 'extraordinary risks.' Hence under the general rule as to extraordinary risks, but subject to limitations hereinafter considered, risks which result from the negligence of the master, that is to say, those risks which are avoidable by reasonable care on his part, are not assumed by the servant. The master, in the proper performance of his duties as such, is bound to exercise care and prudence to prevent his employees from being subjected to unreasonable risks of dangers." (39 Corp. Juris, p. 692) and "risks which result from the negligence of master, that is to say those risks which are avoidable by reasonable care on his part are

not assumed by the servant." (39 Corp. Juris, p. 692.)

In the footnotes to these statements of law are found citations from practically every jurisdiction in the United States including Kansas, Florida and California which we cite:

Kansas:

McMullen v. Atchison, etc. R. Co., 107 Kan. 274, 191 P. 306;

Emporia v. Kowaiski, 66 Kan. 64, 71 P.;

Cherokee, etc. Co. v. Britton, 3 Kan. A. 292, 45 P. 100.

Florida:

Logan Coal etc. Co. v. Hasty, 68 Fla. 539, 67 S. 72;

Fitzsimmons v. Cesery, 61 Fla. 199, 55 S. 465;

Stearns, etc., Lumber Co. v. Fowler, 58 Fla. 362, 50 S. 680.

California:

Morgan v. J. W. Robinson Co., 157 Cal. 348, 107 P. 695;

Sanborn v. Madera Flume, etc. Co., 70 Cal. 261, 11 P. 710;

Beeson v. Green Mountain Gold Min. Co., 57 Cal. 20;

Baxter v. Roberts, 44 Cal. 187, 13 Am. R. 160;

Werner v. Southern Pacific Co., 44 Cal. A. 76, 185 Pac. 1016;

Kreitzer v. Southern Pacific Co., 38 Cal. A. 654, 177 Pac. 477;

Lippert v. Pacific Sugar Corp., 33 Cal. A. 198, 164 P. 810;

Hayes v. Western Fuel Co., 19 Cal. A. 634, 127 P. 518.

Any reference in appellants' brief to the Workmen's Compensation Act of Kansas or Florida is superfluous. They have admitted that plaintiff is an "independent contractor," but argue with misplaced earnestness that "the defense of assumption of risk would apply as between contractor and contractee to an even greater extent than between master and servant especially where the assumption is not implied but contractual." (Page 76 O. B.) This argument is spurious, without authority of law and contrary to the cited decisions. To urge upon this Court because plaintiff accepted "all risks incident to the business" that defendants in the erection of plaintiff's rigging and the maintenance of the equipment *used by her* that acts *of negligence* committed by defendants such as "loose guy wires, kinked chains or hooks, trapeze bars uneven and unlevel, and a risk due to a failure on the operation of the net in catching the artist in the event of a fall" were risks accepted by her, the occurrence of any such happening might result in plaintiff's death or serious injury certainly is not a risk incident to the business. *Assumption of risk "incident to the business" does not mean assuming the grossly negligent*

acts of another. It is not an incident to the business that permits overlapping hooks or uneven bars or failure to move a safety net a fraction of a foot to catch the plaintiff in the event of a fall for whatever reason such fall occurred. These acts of defendants were not incident to the business but gross negligence by defendants in the performance of a duty owed to plaintiff.

The law of Kansas enunciated by its Supreme Court has repeatedly held that an employee does not assume the negligence of the employer or of those for whose conduct the employer is responsible. The employee has a right to assume that the employer has exercised proper care with respect to providing a reasonably safe place of work, and this includes care in establishing a reasonably safe system or method of work.

> "According to our decisions the settled rule is, not that it is the duty of an employee to exercise care to discover extraordinary dangers that may arise from the negligence of the employer or of those for whose conduct the employer or his agents have exercised proper care with respect to his safety until notified to the contrary, unless the want of care and the danger arising from it are so obvious that an ordinarily careful person, under the circumstances, would observe and appreciate them."
>
> *McMullen v. Railway Co.,* 107 Kan. Reports 282,

and again at page 283 of the same opinion quoting from *Ches. & Ohio Ry. v. Proffit,* 241 U. S. 462:

> "To subject an employee, without warning, to unusual dangers not normally incident to the employment, is itself an act of negligence. And, as has been laid down in repeated decisions of this court, while an employee assumes the risks and dangers ordinarily incident to the employment in which he voluntarily engages, so far as these are not attributable to the negligence of the employer or of those for whose conduct the employer is responsible, the employee has a right to assume that the employer has exercised proper care with respect to providing a reasonably safe place of work (and this includes care in establishing a reasonably safe system or method of work) and is not to be treated as assuming a risk that is attributable to the employer's negligence until he becomes aware of it, or it is so plainly observable that he must be presumed to have known it. The employee is not obliged to exercise care to discover dangers not ordinarily incident to the employment, but which result from the employer's negligence."

This argument is equally true whether the relationship found to exist is between employer and employee or independent contractor and contractee.

> "The obligation of the appellant to furnish a safe place for the deceased and his assistants to work was the same whether the deceased be regarded as an independent contractor or as an employee."
>
> *Isnard v. Edgar,* 81 Kans. 765,

and the following citations are cited by the *Isnard v. Edgar case, supra,* with approval:

"Whether the owner furnishes machinery to a contractor while work is being done upon his premises and injury results through his fault in not keeping it in suitable and safe condition, he is liable to any servant of the contractor for an injury resulting to him from the defects therein and his liability arises out of his obligation to provide safe appliances for the contractor to use and to keep his premises in safe condition independent of any contract provision to that effect."

Johnson v. Spear, 76 Mich. 139, 15 A. M. St. Rep. 298;

Emporia v. Kowalski.

"It is the duty of a master to furnish a safe place for his servants to work, and reasonably safe tools and appliances to work with, and the employee, without instituting an investigation to ascertain the condition of the premise, may assume that the master has performed this duty.

"It is contended that the defendant assumed the risk of injury from the falling of the pole, and, therefore, cannot recover. While it is true that the employee assumes the ordinary risks incident to his employment, the risks thus assumed by him, however, are those only which occur after the due performance by the master of those duties which the law imposes upon him."

Pantzar v. Tilly Foster Iron Mining Co., 99 N. Y. 368, 2 N. E. 24;

Stringham v. Stewart, 100 id, 516, 3 N. E. 575;

Benzing v. Steinway & Sons, 101 id, 547, 5 N. E. 449.

In California citation of *Brosius v. Orpheum Theatre,* 60 Pac. 2nd, 156, the Court said:

> "Defendant owed to plaintiff the duty of using reasonable care in selecting and maintaining safe apparatus for his use. The question whether defendant discharged this duty was for the determination of the trial Court. This is sufficient evidence in the record to sustain the findings of the Court on the issue of negligence and contributory negligence."

That defendants provided, maintained and set up the poles, tents and equipment where plaintiff was required to render her performance like those of many other performers in the circus is undisputed.

Under the rule of law enunciated in *Isnard v. Edgar,* 81 Kansas 765, that "the obligation of the appellant to furnish a safe place for the deceased and his assistants to work was the same whether the deceased be regarded as an independent contractor or as an employee," permits us to examine the rules of law enunciated under either relation for guidance. That the doctrine of "assumption of risk" and "whether plaintiff knew and appreciated the danger" and whether or not "the employee assumed the risk was a question of fact for the jury, like that of the employer's gross negligence and in determining it the jury should take into consideration all of the circum-

stances and surroundings." "The finding of the jury on the subject is controlling."

See:

Fritchman v. Chitwood Battery Company, 134 Kansas 727.

Also:

Railway Co. v. Bancard, 66 Kansas 81;

Whetstine v. A. T. and S. F. Railway, 134 Kansas 509;

Tecza v. Sulzberger & Sons Co., 92 Kansas 97;

Wagner Electric Corp. v. Snowden, 38 Fed. 2nd 599;

Hook v. Railway Co., 116 Kansas 556.

In the *Whetstine v. Atchison T. & S. F. Ry. case, supra,* the court said:

> "An employee, of course, assumes the ordinary and obvious risks incident to the service he engages to perform, and if he becomes aware of a danger arising in his employment or it is one that an ordinarily prudent person would observe and appreciate, and he continues in the employment, he would assume the risk. If the negligence and danger are not obvious or come up suddenly and cannot be anticipated, or the negligence of the coemployee is such that the employee has no notice or reason to anticipate the risk, it is not assumed. There are circumstances and elements of the assumption of risk which are matters of fact to be decided by the jury and here the findings are in favor of the plaintiff."

In *Smith v. Railway Co.,* 82 Kansas 136, the following language was used:

> "If the jury believe the plaintiff's testimony that he did not know of the condition of the ties and rails, it disposes of the defense of assumed risk."

Of particular importance is the language found in *Tartar v. Missouri K. T. Rd. Co.,* 119 Kansas 738 at 740:

> "Assumption of risk can be declared as a matter of law where an employee sees the danger, knows what its consequences may be, and continues his work with that danger confronting him. Assumption of risk cannot be declared as a matter of law unless the employee knows, or should know, what the danger is and knowing the danger continues in the performance of his labor." . . . "The jury found that the plaintiff did not assume the risk, and in effect found that, although plain to be seen, the plaintiff from his position did not see the danger. The findings of fact did not show that the plaintiff assumed the risk."

V.

CONTRIBUTORY NEGLIGENCE

Appellant's failure to do more than show adherence to the contributory negligence defense, without which, an answer in a personal injury case would be a legal curiosity warrants the inference that their defense theory is not being seriously pressed.

Their counsel undoubtedly realize that this was purely a question for the jury and that defendants are foreclosed in an appeal following the second trial from raising this defense because on substantially the same evidence, on the first trial and after giving due consideration to appellants' argument in their briefs that Olvera's own negligence caused her injuries. This court held, on the former appeal that, as a matter of law, there was evidence warranting the jury to infer that *either gross or ordinary negligence of the defendants caused* plaintiff's injury, and, also, that there was sufficient evidence of such negligence in setting up the trapeze and failing to hold the net under Olvera.

In Appellants' Opening Brief on the first appeal this defense was made a major ground for reversal. It was claimed that it was contributory negligence for plaintiff not to inspect the net (although no amount of inspection of the net, or of anything about it, other than the heads of the net holders, would have revealed the peril of their standing as though glued to the ground, while the artist fell just beyond where they rigidly held the net.)

It was claimed that the artist was negligent in not falling into the net, and that is intimated, in the instant opening brief (p. 9), where it is said, "she missed the net by about a foot and three inches."

It is amazing to what lengths and heights and depths of absurdity fervor for a cause will lead even the most logical and talented minds. An example of

such absurdities in the opening brief is the statement that the artist "missed the net"! It must be admitted that the net holders did not miss the artist, nor did the net, itself, for the net could not move itself and the men, whether through incompetence, impotency or indifference, no one can know, made no move toward shifting the net and using it for its intended purpose.

In the former opening brief appellants reproached the plaintiff and her husband for not inspecting the trapeze as it rested in the air thirty-five or forty feet up where inspection from the ground would have been impossible, and, besides, as the reply brief pointed out, Barnes' managing agent, Cronin, had told Olvera "not to inspect your apparatus." Our "boys do that."

True, the opinion in the former appeal does not directly mention contributory negligence, but it does so by necessary implication, and it would not be strange if the Court had not regarded such contentions as were made, as above related, as warranting judicial consideration.

Under the authorities which have been set forth, especially *Claiborne-Reno Co. v. DuPont, etc., Co.*, 77 F. (2d) 565, 568, it is the law of the case that there was evidence from which the jury might properly infer that Olvera was not contributarily negligent.

VI.

CONSTITUTIONAL RIGHTS

Appellants' aver that their constitutional rights under Amendments V and XIV of the Federal Constitution have been violated. Respondent denies the allegation. She can do no more. Appellants provide no hint of the basis for their claim except that it is asserted that there has been a failure to apply "the contractual provision relieving defendants of liability." This might be true and still leave said constitutional provisions unimpaired.

VII.

BIAS AND PREJUDICE CREATED AGAINST DEFENDANTS

This point in the opening brief appears like the final taper of a mouse's tail.

This tapering began to be marked with Point IV.

In the trial Court the issue as to bias and prejudice was launched with much avidity and confidence. Alleged grounds for a new trial in defendants' motion include misconduct of the Court and plaintiff's counsel in several respects, and the affidavit of Lee Combs charges very serious misconduct by these two Court officials. In substance and effect one charge was private discussions between them in the Judge's chambers concerning the instructions and actions of the Judge in respect to an instruction which was claimed to be misleading to defense counsel; a number

of acts and statements by the Court showing bias and prejudice against the defendants' cause and misconduct of the plaintiffs' attorney during the argument, and, "that the course and conduct of the Court as indicated was one of bias and prejudice and said course, consistently carried out," developed and created a prejudice in the mind of the jury against the defendants from which the verdict rendered was "the result of passion, prejudice and influence."

These are serious accusations. The last one being a positive statement of alleged fact, and not merely one based on probability or counsel's belief, or even information and belief, *should not be made by any lawyer without some substantial evidence.*

However, although the caption to Point VII in the opening brief presages the pressing of these asseverations without reservation, the presentation of the question which follows is tantamount to an abandonment of the bias and prejudice issue as to the Court, for after mildly asserting that numerous comments of the Court gave the jury an impression that the Court was unfavorably disposed to defendants' case, that matter is dropped with a mere reference to Paragraph X of Appellants' Statement of Points to be relied upon on appeal, without even a citation of the transcript page where such statement may be found. (For said Paragraph X see R. Tr., p. 546, et seq.).

This statement contains several pages of quotations of language used by the Court, many of which are only one line in length, and none of which *per se*

indicate bias, prejudice, plain error, or anything other than a ruling, presumably sound, by the Court.

Able and learned counsel must know that it is not to be expected that an appellate court will brief an appellants' point for them, especially for the purpose of ferreting out some excuse to reverse a judgment upon a misconduct charge against a public official.[3]

Again, the mere mention of an assignment of error in a brief, without sufficient argument or citation of authority in support thereof must be treated as waived.[4]

Hence respondent may properly assume that the charges of biased and prejudiced comments have been abandoned.

However, since the "Statement of Points," etc., include a general claim of biased and prejudiced "attitude" on the part of the Court respondent feels that it is due the trial Judge that this reflection and unwarranted aspersion be removed by a determination on appeal that it has no factual foundation.

Appellants' counsel are, therefore, challenged to meet this issue in the closing brief and to explain upon what facts said assertion was made in said affidavit and "Statement of Points" referred to in the opening brief.

That brief glides over this matter and all assignments of misconduct of the court in the affidavit above

[3]See 5, C. J. S., pp. 1230, 1231 and cases cited.

[4]See 5, C. J. C., pp. 1532, 1533, Where cases are cited from many jurisdictions..

mentioned as though ashamed to directly and openly face the issue and to expose how insipid are appellants' charges by quoting the language of the Court with which the epithets "misconduct," "bias" and "prejudice" have been labeled.

The opening brief (pp. 82, 83), states that the Court made "numerous comments during the course of the trial" to the defendants' detriment and the plaintiffs' advantage but ceases to use the term "misconduct"; and in lieu of pointing out the comments and acts of the Court which are claimed to have given the jury impressions that the Court was "unfavorably disposed to the defendants' case," reference is made to another document.

We assert that not a single item in that enumeration, when read and judged by its context is reasonably capable of being regarded as exhibiting prejudice in the slightest degree.

We insist that it was opposing counsel's duty in briefing such serious charges to point out how these assignments warrant their criticism and condemnation.

Failure to do so must be construed as either a confession of weakness or an attempt to place the burden of elucidation upon respondent to prove the Court's innocence.

We decline to be placed in that position but claim the right, if the closing brief attempts to perform its clear duty in this behalf, to reply thereto.

The several pages of such assignments, detached from their respective contexts are incoherent and unintelligible.

However, as an example of the unfairness of the procedure which respondents have followed and the entire innocence of the alleged prejudicial comments let us take the one first in the list. (Pr. Tr., p. 746.)

The item reads—

> "She is so familiar with it; she has stated her qualifications; I think she is in a position to testify. She appears to be an expert on that. I don't mean an expert, so far as a trapeze artist is concerned, but she appears to be an expert in the knowledge of its operation. You may answer. Do you understand the question?"

This statement by the Court was immediately preceded by a question by Mr. Marcus on direct examination of the plaintiff and an objection by Mr. Combs, which read:

> "Q. Is there any way of counteracting for this overlapping hook by any guy lines or ropes?
>
> MR. COMBS: I object to that as calling for a conclusion.
>
> Q. BY MR. MARCUS: Is there any way of making this bottom bar level in the event that this 8 hook overlaps, as it does?
>
> MR. COMBS: I object to that as calling for a conclusion of the witness." (P. Tr., p. 158.)

The witness had previously testified that when she was five years old her father began training her on the trapeze. She detailed such training and said that at the age of eight she began to travel with the circus, performing her act on the trapeze for Ringling Bros. and Barnum & Bailey in Europe and other foreign countries (P. Tr., pp. 147-150), and continued to perform the same act with Ringling Bros. from 1933 to 1936. (R. Tr., p. 151.)

The witness had explained the make-up of her apparatus, "the big main falls," the "heavy rope with blocks" (which were offered in evidence); she had shown how the parts of the apparatus were connected with the rendition of her act. Using the apparatus itself, she told and showed in detail how the clevises, hooks, guy lines, and bars are placed and connected and fastened to iron stakes or to the tent roof or tent poles and how the main bar would be made level; She had explained how bars should be adjusted and how the bars are suspended by "those rods and ropes," and the meaning of these terms.

Olvera had testified that she had used "that same bar all her life," referring to the one on which her performance is done, it being the "trapeze bar that has stars"; had pointed the height of the bars, and other details both of the construction and operation of apparatus parts. (R. Tr., pp. 154-156.)

Using the apparatus itself, the witness had shown the effect of an overlapping S hook, and no objection

had been made to any of the expert testimony with which her testimony had been honeycombed.

This is the point at which Mr. Combs objected to a question as calling for a conclusion of the witness, and the Court said (Pr. Tr., pp. 158-159):

> "THE COURT: She is so familiar with it; she has stated her qualifications; I think she is in a position to testify. She appears to be an expert on that. I don't mean an expert, so far as a trapeze artist is concerned, but she appears to be an expert in the knowledge of its operation. You may answer. Do you understand the question?
>
> A. I would like to hear it again.
>
> Q. BY MR. MARCUS: In the event this S hook is overlapping, as it does, the guy lines that you testified to before, that come off of this clevis to the ground, can they be adjusted or pulled in any way so as to make the bottom bar level?
>
> A. Yes, sir. [16]
>
> MR. COMBS: I object to that as leading and suggestive. He is telling the whole story himself, and asking for a yes or no answer.
>
> THE COURT: In the case of People v. Jones, 160 California, Mr. Combs—if I have that citation correct, and I believe I have—the mere fact that a question calls for a yes or no answer is held not to be leading; but it is important that you do not lead or suggest to the witness, Mr. Marcus. This is a very important phase of the case, apparently. I think you should first show how that 8 hook you refer to should hang ordinarily. I think that should be brought down just as the other one is. Proceed, Mr. Marcus.

Q. BY MR. MARCUS: Will you tell us how, when the hook is in the position that it is—

THE COURT: For the purpose of the record you should have explained what position it now is in, Mr. Marcus.

MR. MARCUS: The 8 hook overlaps the ring on the upper bar.

THE COURT: The top part of the 8 hook?

MR. MARCUS: That is right."

This is a fair sample of the most serious of the alleged acts of misconduct and comments by which Mr. Combs swore that bias and prejudice of the Court was shown. The correctness of the Court's ruling is not challenged nor does the opening brief attempt to criticize the Court's language, manner, intentions or anything else about it except by referring to a document which merely refers to the matter in a general way, employing such terms as "bias" and "prejudice."

This court is asked to hold that without reference to their context the trial Court's comments constitute prejudicial misconduct *per se* and reveal a biased and prejudicial attitude. *Such a course and this procedure is inconsistent with good faith when employed by experienced and able counsel.*

In fairness to the trial Judge we shall quote at length his reply to appellant's counsels accusations of bias and prejudice as appears in the Supplemental Transcript, pages 768 to 782 inclusive, which appellants have failed to do:

"Los Angeles, California, Tuesday, March 7, 1944; 10:00 A. M.

THE COURT: The court intended to rule on all of these matters now, but will rule only upon the motion for judgment non obstante veredicto. I think that that motion should be denied, and it is. But as to the motion for a new trial, I am going to give further consideration to the instructions.

I endeavored to give the instructions which I thought covered the issues, but no matter how careful either counsel or the court may be in preparing instructions, we never know how proper they are until they are viewed in a more detached way, which comes when a motion for a new trial is made, or upon appeal.

But of one thing I am very, very sure, and that is there was no bias on my part, no prejudice whatsoever. I certainly never have sat in a case in which I have been prejudiced at all. There have been cases in which I have had some particular feeling, either that I was in favor of or adverse to a party, and I have disqualified myself. There have been other cases in which there has been some appearance, perhaps, for some party for whom I had been attorney maybe years before I had gone on the bench, or where, perhaps, some person during the time I was in the State court, and had to run for office, had been very active either for or against me in my election, or some other instance, where the possibility of a business affair which would not disqualify [8] me, but which, if unexplained, might indicate that there was some connection between the party and the court, and I have been so careful about those

things that I have leaned backward. In fact I have been criticized at times for doing so, and for doing so under such circumstances, sometimes, where it was said by those who did not like me that I was trying to escape a difficult situation by having some other judge try a case. Those are things which each judge has to determine for himself, and that I have done; but, certainly, I have never sat in any case in which I have been biased, or in which I have had any feeling of prejudice whatsoever, and I think, looking at it as I do, I would be the first one to know that.

However, I was impressed with what Mr. Combs had said, even if he did not question the sincerity of the court, that the court might, without its own knowledge, have done things which would indicate a leaning toward the plaintiff, and I tried to review some of those things. I can't think of any.

Certainly, during the course of the trial the judge has to rule, and at times to give an explanation for his rulings. The judges of the court are no more perfect than counsel are. They may say things which at the time appear to be entirely proper, which, when viewed later might carry with them some implications that were not intended; but in a protracted lawsuit that is likely to happen. There would never be a judgment that would be sustained if every [9] little word which came up, or every word which the court used, would be scrutinized in the strongest light. The purpose of courts is to do substantial justice. We can all make mistakes. We are all human, and as long as we are, we are going to make mistakes.

One of these things I recall, and I am sure all of you gentlemen will recall, is that in the discussions as to certain instructions—I think they were the instructions upon damages—there was an objection which was in writing, and which were filed. The court asked that they be filed, and they were filed. At that time they were not filed, and we were discussing them Saturday morning in my chambers, and I said I did not believe that the defendants' objection was sufficient; that it would not come within the provisions of the rule. Mr. Corkery asked if I had in mind that it wouldn't be specific enough. I said, 'Yes, Mr. Corkery'—no doubt, you will recall I have done that throughout the trial—'I don't care anything about one party or another. It is all in the day's work for me, but I do want to see proper instructions. And I also like to see that the parties keep their record. If they want to make a record of the rulings of the court that, of course, they have a right to do.'

The day before the trial of this case—I think it was on Monday—Mr. Marcus, before the beginning of the law and motion calendar, approached the lectern, and Mr. Combs [10] was there. He said Miss Olvera wanted to amend her complaint to ask for a greater amount of damages, and without waiting for Mr. Combs to object I said immediately 'I think the court knows enough about this situation to deny that motion.' I thought that the motion had not properly been presented, and that no affidavit had been made to show that there was any change, so that was my immediate reaction. I think throughout this trial

both parties will find places throughout the record where I made suggestions to counsel, and statements that the court made regarding what its rulings were. In considering the motion for a new trial, of course the court will consider the evidence as presented in this case, not only on the question of damages, but upon all other questions.

As I say, it really was quite a surprise to find that I had been charged with bias and prejudice in this case, when I knew that I had none. I try to be fair to everyone, no matter who he is, and I considered the fact that Mr. Combs had said that without the court's knowing it even, prejudice might have been reflected. I knew I did not have any prejudice, but at the same time I had that argument in mind, so I read over parts of the transcript—not all of it; I did not read Mr. Pollinger's testimony, but I read Miss Olvera's.

Here is a time (referring to transcript of Miss Olvera's testimony at the trial), when I thought Mr. Marcus was taking up too much time with the examination of Miss Olvera on direct examination. I don't like to interfere. [11] I don't like to interrupt. I figure that the attorney knows more about this case than I do, but, of course, the court had this before it: The case had been tried once before, and I felt that the appellate court had crystallized the issues quite well, and that it had fixed the law of the case upon certain of the issues. So, after a long answer, beginning on page 5, line 7, and continuing over to page 6, line 2, I interrupted Mr. Marcus, as follows:

'THE COURT: Mr. Marcus, do you think it is important to go through these details, until she

did attain the position of a recognized trapeze artist?

'MR. MARCUS: The only thought I had, it would save time, because we would not have to repeat it when it came to her performance with the circus.

'THE COURT: When you get down to the act, I think it is important, but when it comes to these various steps in training, I don't think it is important.'

That was for the purpose of saving time. It is the duty of the court to direct the progress of the trial. Page 8 the court aagin interrupted. A question had been asked by Mr. Marcus, and Mr. Combs said:

'We offer to stipulate at this time that the contract you have in your hand was executed pursuant to negotiations between Mr. Valdo, representing at that time Ringling Bros. Circus.

'THE COURT: Isn't that sufficient? [12]

'MR. MARCUS: Yes. Will you stipulate that Mr. Valdo was not present at the time Miss Olvera signed the agreement?

'MR. COMBS: I don't know that. If you will ask her.

'THE COURT: Let me ask you: In view of the appellate court's decision in this matter is that important?

'MR. MARCUS: I don't think so.

'MR. COMBS: No.'

There we were all in agreement, but the question was asked by the court for the purpose of saving time, a proper direction, as the court believed,

of the course of the trial, and without any thought as to whom it should benefit at all. That did not have any part of the court's mind. On page 9 a question was asked by Mr. Marcus:

'Q. Relate the conversation to the jury, at the time the contract was executed.

'THE COURT: What is the importance of it when you have the contract received in evidence?'

It might have been Mr. Marcus had something very important in mind, but I did not consider it was, and that is the reason I asked him the question, and, as shown by statements of counsel as follows, they agreed with the court:

'MR. COMBS: I offer to stipulate, your Honor, that by virtue of that particular contract she was directed and sent by Pat Valdo, personnel director of Ringling Bros. Show, to Barnes Show; that she was received there, and employed by that show under the terms of that contract.'' [13]

On page 10 the court said:

'Might it not be agreed that she was an independent contractor?

'MR. COMBS: Yes.

'MR. MARCUS: So stipulated, your Honor.'

On page 28, Mr. Combs stated:

'I understand our objection to testimony respecting the net is continuing, and that it will be so stipulated without having to make it each time, after each question.

'THE COURT: I did not so understand it, but that is very satisfactory to the court, if it is to Mr. Marcus.

'MR. MARCUS: Yes.'

I think that is another indication of the readiness of the court to agree to anything that would preserve the record, in this instance in favor of the defendants. On page 36, line 24:

'MR. COMBS: I object to that as leading and suggestive, and I would ask that counsel refrain from that course of conduct.

'THE COURT: The court will admonish counsel to avoid leading questions.'

Which I think I did from time to time throughout the trial. Mr. Marcus did ask a number of leading questions, as lots of counsel do. Ordinarily they are not objected to unless they get right down to a very important matter or very important issue, and Mr. Combs took that position, [14] a time or two, that while the questions were leading, they happened to be more preliminary than otherwise, and did not get right down to the important parts. In fact, right on the same page, line 19, is the following:

'THE COURT: Mr. Marcus, I wish you would bear in mind the court's admonition. However, this seems to be preliminary.

'MR. COMBS: I don't care about it unless it gets up to the point where it is critical.'

Then I added:

'A great many attorneys are guilty of the same thing. I would like to have Mr. Marcus bear in mind that objections are made, and the court has to sustain them.'

I had in mind, of course, objections made where they were leading, and that it was the duty of the

court to sustain them. On page 40, line 22, an answer was made by Miss Olvera, and Mr. Combs stated:

'If your Honor please, the last part of the answer is not responsive. This witness is inclined to do that. I think a motion to strike lies, and, of course, the damage is always done when the non-responsive part is put in, and I have no opportunity to object to it. Likewise, counsel's questions are leading and suggestive.

'THE COURT: You may make your motion to strike out, if you think you would like to have the court consider it.

'MR. COMBS: I don't want to hamper the speed, of course, [15] of this trial, but I have to combat with this persistent leading and suggestive course, and likewise the non-responsive answers. Of course, I can't anticipate them. I wish counsel would refrain from asking them, and I wish the witness would refrain from giving non-responsive answers.

'THE COURT: Would you read Mr. Combs' statement?

'(Statement read by the reporter.)

'THE COURT: Proceed.'

The court still thought he should proceed, as he had given Mr. Combs an opportunity there to make his motion if he desired, as I would any counsel in any case. I think you will recall, during the course of the trial, a matter which occurred out of the presence of the jury, when the court itself had excused the jury, there was some statement about the ruling of the court, and that the court's

mind was already made up. I explained to Mr. Combs that the court's mind was not made up; that the court did not foreclose its mind until the matter had been entirely submitted; and he had a right to argue the matter at any time. I don't recall about that, but I think I ruled in favor of Mr. Combs. But, in any event, before the jury returned. I think I called attention to the fact that Mr. Combs had made this statement, and he very properly stated that during the course of the trial, in the heat of it, statements are made which are not given full consideration, and asked to apologize, and did apologize to the court. I said the [16] apology was accepted, as the court understood these things; and the court does understand them, and is always inclined to be very lenient with the statements that are made under such circumstances. But I think considered statements that are made otherwise should be given their full credit, always taking, of course, into consideration the fact that any of us may be mistaken as to matters of memory. Page 68, line 22, a question was being asked by Mr. Combs of the witness Olvera:

'You don't mean to give the jury the impression—'

Then I interrupted Mr. Combs, stating:

'I think you are asking about what the custom was when she was performing her act. She was referring to the very last act.

'MR. COMBS: What I am trying to bring out is the fact that they remained there stationary right in the center under the trapeze during the entire period of time.

'THE COURT: I think that is quite apparent, but I think she is answering the question as to what she saw done the last day, the day of her fall. That is the way it occurs to the court.

'MR. COMBS: Let me see if I can clear that up.'

There the court was endeavoring to clear up a point, where I believed Mr. Combs was asking questions about one thing and the witness was answering about another. There is another question on the same page, line 8, where Mr. [17] Marcus interposed this objection:

'MR. MARCUS: I object to that as calling for the conclusion of the witness.

'THE COURT: That is not a conclusion, Mr. Marcus. She should know whether it was satisfactory to her. Objection overruled.'

On page 74, line 16, Miss Olvera answered:

'Yes, when I came down I struck one of the mens, right here in his shoulder, but it was in between the two men.'

She at that time pointed to one of her shoulders. I said:

'You are referring to your right shoulder?

'A. Yes, right here; not on the shoulder. I struck in here.

'THE COURT: You changed around to your left shoulder.

'Q. BY MR. COMBS: Was it his right shoulder?

'A. I try to show you. I don't remember.

'Q. BY THE COURT: You don't know whether it was the right shoulder?

'A. No, I don't.'

There I noticed that she had changed from one shoulder to the other, and pointed to it, and I thought it was proper to call that to the attention of the attorneys, and I wasn't interested in whose favor it was. I just thought that was an inconsistency or discrepancy that attention should be called to. [18]

Page 86, line 19, the following appears:

'THE COURT: In any event it calls for the conclusion of the witness. Mr. Combs, you don't mind the court suggesting something?

'MR. COMBS: Not a bit.

'THE COURT: In your questions you have used the phrase a number of times "I take it" such and such. Just ask the question directly, and I think it will be more definite.

'MR. COMBS: I will withdraw it and reframe it.'

I think afterwards Mr. Combs did change that. A time or two he used the same expression, but he changed it, as I stated I believed it would be better to ask the question directly. I have never hesitated to make suggestions to counsel during the course of the trial, because I only had in mind one thing, and that was to see that all the parties got a fair trial. I may say that judges vary in their actions in the trial of a case. Some judges take a very large part in the trial of a case, and some hardly say anything, but judges are different, just as lawyers are, and they have to do these things according to their own views and their own temperaments. On page 87 Mr. Combs had asked

a question, to which there was an objection, and Mr. Combs said:

'MR. COMBS: Just answer the question; if she saw anybody do anything.

'MR. MARCUS: Ask her that question.

'MR. COMBS: Did you?' [19]

Then the court asked to have the question read.

'THE COURT: Before the court rules upon your objection, Mr. Marcus, the court admonishes you not to tell Mr. Combs what to do. If there is any objection you have to his method of examination, you make your objection to the court. The court does not expect to have any controversy here between counsel. The objection is good. Sustained.'

On page 88 there is another example. The court noticed a mistake in the use of a word, and thought it should be called to the attention of the attorneys. It was on cross examination. On line 8, Mr. Combs said:

'Q. Your action requires the utmost of precision and accuracy in foot placement and the placement of your hands and your body, doesn't it?

'A. What?

'THE COURT: Read the question, Mr. Dewing.

'(Question read by the reporter.)

'THE COURT: Do you mean act or action?

'MR. COMBS: I mean act.

'THE COURT: Reframe your question.'

Mr. Combs then reframed the question, and used the word 'act.' I thought he meant 'act,' but that he had inadvertently used the wrong word.

That happens to all of us. I think there is no one who does not use the wrong word at times. For example, I read an instruction, in which I used a word I did not intend. It was called to my attention. I had no [20] knowledge of it. But that frequently happens; not only happens in the course of ordinary conversation, but in court. I have had attorneys refer to plaintiff when they meant defendant, and vice versa; things just exactly the opposite. An page 90 there was a discussion between Mr. Marcus and Mr. Combs. I thought the matter was clear. Line 16:

'THE COURT: I think that all of this testimony concerning the act places Miss Olvera on the bar. That was what you intended, wasn't it, Mr. Combs?

'MR. COMBS: Certainly, your Honor.

'MR. MARCUS: If he did, your Honor, I don't believe the question includes that statement.

'MR. COMBS: We will just amend it to include it then.

'MR. MARCUS: Thank you.'

There was a place where the court desired to make the point entirely clear. So, in reading over this, I can't see that there is any reflection of an indication of bias. I know there was none. Nobody would know that better than myself; and I know there was none. Even considering the points which were brought out by Mr. Combs, considering all of those things, I can say I don't think there was any indication of bias, and I don't see how there could have been bias, because none existed.

I did not refer to all of the matters that I saw in the testimony of Miss Olvera which I thought might have some bearing on that point, but I don't think the court will [21] make any further statement in regard to the matter now, except that I am going to give very serious consideration to whether or not the instructions were justified by the law and the evidence, and when the court has done so it will make its ruling.

MR. COMBS: Would you like to keep that copy of the transcript for a while?

THE COURT: No, I don't believe it will serve any purpose. If I need it, Mr. Combs, I shall ask Mr. Dewing if he wil read over certain parts of the testimony, or I may have it written up for me. I may say that I did have Mr. Dewing read for me that part which had to do with the interruption of counsel for the defendant, and certainly there was nothing in there that, in the court's opinion, would justify the conclusion that Mr. Combs has reached.

There occurs to me another thing which I would like to mention, and that is the reading of defendants' instruction No. 4, and then advising the jury to disregard it, and reading it again as the court corrected it. Immediately thereafter the court read a part of instruction 5, which was given by the court. The court was of the opinion that it was unnecessary to add that part, which was marked out. The court failed to give that part of the instruction, and it was so indicated, that it was given as modified, and gave instruction 4 as modified.

Now, as to stopping for five minutes or so, again I [22] dwell upon the imperfection of

judges, the same as the lawyers. When I went over the instructions I decided to give instruction 4 as it was offered. Then, in reading it, it had a different sound, had a different effect, and I felt that it was improper to give it as it had been presented, and I considered the propriety of changing it, and finally I did make the changes which appear upon the face of the instruction. It took some little time for the court to determine that, and also to make the changes, but that is not unusual in cases. It isn't the ordinary thing, it is true, because ordinarily among judges—and that applies to myself—generally judges who prepare the instructions give them just as they are prepared. And in a case it sometimes happens a judge may decide to change the instruction, even after he has given it; and that's what happened in this case, and I think it was not prejudicial, and there certainly was no intent on the part of the court except to make the instruction conform to what the court believed the law is.

I think the court has covered most of these matters. When this affidavit was filed by Mr. Combs I thought I might have some other judge sit upon this motion, but I came to the conclusion, and this after consulting a judge of our court, who has had long experience here, that when it came to the matter of a motion for a new trial that I was really the only judge who could and should act upon the motion. It [23] would be different upon the trial of a case in which a judge is charged with being prejudiced, at the beginning of the case. Then it would be entirely proper, and it is the law, if there is an affidavit of prejudice filed, that some other judge should sit upon it."

Misconduct of Appellee's Counsel

The opening brief again adopts the same course as above depicted concerning alleged misconduct of the Olvera's attorney. It states that "counsel made improper statements and comments to the jury" in connection with depositions and the whole case, which the trial court permitted, and refers this court to the transcript to find out, if it can, from pages 667-669 thereof of what language appellants' are complaining. The court is also referred to pages 32 and 33 of the opening brief for such information, where Point VIII of appellants' "Statement of Points" upon which they rely is said to make the revelation.

Said Point VIII, pages 32, 33, make no reference to the subject of counsel's comments and pages 667-669 of the printer's transcript relate a portion of only two comments of plaintiff's counsel.

Without the slightest attempt to show how counsel's comments were improper or prejudicial, or why, if improper or prejudicial, the withdrawal of one by said counsel when his error was corrected, and the instructions of the court to the jury to disregard both did not suffice to render such remarks harmless, respondent is not called upon to elucidate these matters or to anticipate an argument by appellants and combat a mere shadow which the appellants' indefinite and incomplete presentation of their assignment in this behalf have cast upon the record on which the instant judgment rests.

Respondent insists that appellants' opening brief abandons the issue and that they have no right to revive it or pursue it further.

The only argument in the brief proper on this point is stated as follows:

> "Counsel made improper statements and comments to the jury in connection with depositions and in connection with the case as a whole which were permitted by the trial court during the course of the argument and *the instruction of the court to disregard certain of these matters* as appears in the record (Pr. Tr., pp. 667-669) did not alter the effect of bias and prejudice against defendants by reason thereof." (Page 83 of opening brief.)

The rule is apparently universally settled that an assignment of error will not be considered, but is regarded as waived, where it is not presented and argued in appellants' brief.[5] Columns of cases are cited in *5 C. J. S.* (pp. 1226-1230), in support of this proposition, and it is also said that where the point is not properly presented in the argument of the opening brief it will be disregarded even if discussed in the closing brief.

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[5]*U. S. v. Chicago B. & Q. R. Co.*, 82 F. (2d) 131; *Doherty v. Bartlett*, 81 F. (2d) 920; *Mo. Pac. R. Co.*, 78 F. (2d) 253; *Schwartzman v. Lloyd*, 82 F. (2d) 822; *Wynne v. Fries*, 50 F. (2d) 161.

Stark v. Haeft, 205 Cal. 102, 269 Pac. 1105; *Noble v. Noble*, 198 Cal. 129, 243 Pac. 429, 43 A. L. R. 1235; *Fairbanks v. MacReady*, 92 Cal. App. 156.

Silva v. Robinson, 156 So. 280 (Fla.); *Norman v. Atchison etc. Ry. Co.*, 101 Kan. 678, 168 Pac. 830.

Southeastern Ex. Co. v. Robertson, 264 U. S. 541, 68 L. Ed. 840; *Home Ben. Ass'n v. Sargent*, 142 U. S. 691, 35 L. Ed. 1160; *Miles v. Caldwell*, 69 U. S. 35, 17 L. Ed. 755.

Under "Specification of Error Relied Upon" appellants under Point VII (Opening Brief, page 28) have listed certain isolated statements made to the jury during argument by plaintiffs' counsel as constituting "bias and prejudice" but no argument is presented in support thereof. (Opening Brief, page 83.)

The argument was perfectly proper and made in answer to defendants' argument to the jury. We quote portions of his argument to show the reasonableness of the answer.

> " . . . And these gentlemen (defendants) in operating their business . . . could not possibly make a contract other than like the one they had here. . . .
>
> The performer comes to the employer and says I want this job, and I am good at it. The employer says back: Will you take all the risks? We can't afford to take you unless you do. It would lick us in to time unless you did. She says: Yes, I will and she signs the contract." (Pr. Tr., p. 680.)

And again—

> "Miss Olvera, when she undertook her contract with these show people, was very familiar with the whole business. She knew all the risks, dangers, and hazards; and *they would not have wanted a single* performer *for any of their shows, who did not have such a contract.*" (Pr. Tr., p. 679.)

And further—

> " . . . Barnes Circus is *one of the big circuses of this country, enjoying an important part*

in the history of this country . . . not to be shamed and disgraced by suddenly being informed that they grossly and negligently conducted their business, which they had been conducting for 50 or 75 years. *I claim it is not fair; it is not just; it is not right; it is not true.*" (Pr. Tr., p. 681.)

and

"Being a track man, *I know that absolutely; if you keep your feet on the ground* you can run faster *than you can jump.*" (Pr. Tr., p. 685.)

and

"The fact of the matter is it was Miss Olvera's own unfortunate act, or her own carelessness that caused the misfortune; it was not the defendants'; and money should not be taken away from these defendants, and given to this plaintiff, just because she suffered an accident. That is not right; it is not the law; it is not justice, because the defendants are here entitled to the protection of the law and the court, just as the plaintiff is." (Pr. Tr., pp. 688, 689.)

and

"She was performing under this particular contract, and I have called the terms to your attention. I sincerely hope you will study it in the jury room. Its terms are clear and unambiguous. It is an independent contractors' case, and the relationship of master and servant does not exist." (Pr. Tr., p. 689.)

and

"Gentlemen of the jury, remember this is not a master and servant case. This woman was an independent contractor, and that, under the law,

implies that she had full control and direction of the means and manner of operating her act." (Pr. Tr., p. 680.)

and

"This woman fell so close, not to exceed a foot, perhaps a little less, an ordinarily reasonably prudent man would have thought, especially if she were in a ball, turning over, that she would fall into the net." (Pr. Tr., p. 687.)

and

"We have no hesitancy or doubt or concern in submitting this matter. When I say we, I mean I, as representing these two corporations, . . . " (Pr. Tr., p. 692.)

Plaintiff's Instruction 14-A

The last assignment of misconduct by the court made indirectly in the opening brief by reference to other documents filed by them, concerns the above-named instruction.

It has been said that the thesis in the opening brief pertaining to bias and prejudice tapers off into nothingness.

It is believed that the simile which has been used in that behalf, is justified by the contrast between the averments in the above mentioned affidavit, sworn to by Mr. Combs, pertaining to said instruction 14-A and the *entire absence of even a reference to these averments,* in both the "Statement of Points" to which the opening brief refers and said brief itself.

That the aspersions against the trial judge contained in the said affidavit were untrue and unwarranted is *shown* by Judge Beaumont himself, and in effect admitted by the affiant when appellants' motion to set aside the verdict, for a new trial and other motions were heard. (Supp. Tr., p. 764 et seq.)

It is quite lengthy but the substance of what was said about the drafting of Plaintiffs' 14-A is as follows:

> The Judge said that "when we were going over the instructions" Mr. Marcus was late; that after waiting some time he and defense counsel, Corkery and Combs, began to discuss them. Later Mr. Marcus came and the judge told him what the discussion had been. Among other instructions No. 14 was then taken up. Mr. Combs made an objection that it did not cover contributory negligence. The Judge thought it was sufficient. Mr. Marcus said, "if the court will reframe that instruction I will ask him to give it" and said he would withdraw "this other instruction." The court marked on No. 14 "may be withdrawn," and later marked it "refused."

The Judge denied that he had attempted to draw a formula instruction but declared:

> "What I was trying to do, and I so stated, was to set the issues out clearly, and there were two or three bases on which, if they determined the evidence in that respect, they could not find for the plaintiff. So I set these up, and, I said

'all of these terms will be defined' I showed it to you. I think the three of you were standing here, right in front of the bench."

The Judge asked if anyone had any objection. Mr. Corkery and Mr. Marcus made objections. The court did not give it.

Judge Beaumont said:

"During the time from, say about twenty minutes after ten, or so, until the time I mentioned when you left, we (Combs, Corkery and Marcus being present) spent all of that time discussing these instructions. One of those instructions was 14, and that when the court suggested that they 'get some lunch' the attorneys had other things to do, and Judge Beaumont said:

'Very well, we have gone over these instructions. After all, they are the court's instructions. I will go over them, and see what should he done.' "

The Judge made it clear that the one given, marked Plaintiffs' Instruction 14-A, was entirely prepared by him.

In the end Mr. Combs said:

"MR. COMBS: I think your honor on the whole has very well recited the circumstances. I think I have a little different interpretation as to some of them but in substance it is not a great deal different. I will drop the subject." (Supplement Tr., p. 768.)

No attempt was made to substantiate the sworn averments in Mr. Combs' affidavit that

> "during the course of the trial, the court consulted privately in Chambers with David C. Marcus, attorney for plaintiff . . . and affiant is informed and believes . . . and alleges discussed at said private meeting instructions submitted by the parties to this action; and affiant was not called nor was any of the counsel for defendants' called in said consultations at which instructions were discussed; that thereafter the court of its own motion, prepared several instructions to be submitted on behalf of the plaintiff; that some of said instructions were abandoned but that the court in particular prepared and submitted and read to the jury plaintiffs' Instruction 14-A." (Pr. Tr., pp. 105, 106.)

Mr. Combs must have known that everything in the above quoted excerpt from his affidavit was untrue, false or unfounded, except that the trial Judge prepared "Plaintiff's Instruction 14-A" and so marked it.

Failure to present any evidence upon which he made the one averment on information and belief indicates that Mr. Combs had none. These insinuating aspersions at the trial Judge should not go unnoticed.

Again respondent insists that the affiant must have known that the averments of fact above quoted were untrue and that the averment on information and belief was unfounded.

This conclusion is compelled by his concession at the hearing on the motion for a new trial that the court's recital of the history of Instruction 14-A was substantially correct.

Appellants based their motion for a new trial entirely upon the foregoing averments and one other which reads as follows:

> "That at the outset of this proceeding affiant submitted as a portion of Defendants' Instructions, certain instructions on the subject of master and servant, copies of which are attached hereto marked Exhibit "A" and made a part hereof as if set forth verbatim herein, being six in number; that the Court examined the same and on or about the 5th day of January, 1944, the Court informed affiant that since the case was being tried on the theory of independent contractor said instructions were unnecessary, and requested that affiant withdraw the same, upon which said statement affiant did withdraw said [117] instructions; that thereafter and during the course of the trial, the Court consulted privately in Chambers with David C. Marcus, attorney for plaintiff in the above entitled matter, and affiant is informed and believes and on said ground alleges discussed at said private meetings instructions submitted by the parties to this action; that affiant was not called in nor was any of the counsel for defendants called in at said consultations at which instructions were discussed." (Pr. Tr., p. 105.)

In said hearing on the motion for a new trial the gist of the statement above quoted was shown to be false, as shown by the following:

"THE COURT: When the question came up with regard to the instructions on master and servant, my recollection is that it came up the first time when the three counsel were present,—two for the defendants and one for the plaintiff, and that the observation was made that since the ruling in the case that went to the Appellate Court, the instructions regarding master and servant were not applicable, and I think then I said, 'Is it your desire, Mr. Combs, to withdraw them?' And you replied it was; but the court made no request that you do so. In twenty-three years on the bench, speaking of myself as a judge, I have never requested the withdrawal of an instruction in my court.

MR. COMBS: That is substantially what the affidavit says, in any event.

THE COURT: I don't think it is, substantially. That is my recollection.

MR. COMBS: I don't like to disagree with your Honor. My impression is a little bit different.

THE COURT: That is my recollection.

MR. COMBS: I know we had a discussion on the 5th, in court. I put that date down. I know we also had one on the 8th.

THE COURT: I couldn't say about the dates. [2]

MR. COMBS: Anyway, reasonably sound minds can be mistaken on those things.

THE COURT: That is true. Another thing that happened later on, when you said that you would withdraw them, you did not withdraw all of them. I looked through, and saw at least one—there may have been two—and I said, 'Mr. Combs, you didn't withdraw all of your instructions,' and you said, 'No, I notice that I did not, but I think I will leave them in there. My theory is that the master and servant rule does not apply, but I have other counsel, and I think I should let them stay in.' I said, 'Very well, let them stay in.' I refused to give them." (Pr. Tr. Supplemental 764-765.)

Certain it is that the court was right. The affidavit plainly declares that the court "requested affiant to withdraw said instructions" on master and servant.

This is certainly not "substantially" the same as the court asking,

"Is it your desire, Mr. Combs, to withdraw them? . . . The court made no request that you do so."

Why should any trial Judge *request* an attorney to withdraw any instruction?

At any rate Mr. Combs in effect confessed that the court did not make such alleged request.

It is pertinent, (since the course of conduct of defense counsel concerning the entire matter of the motion for a new trial suggests lack of good faith).

It should be added that the affidavit of David C. Marcus controverts each of the averments in the Combs' affidavit, except that the court prepared Instruction 14-A, but after conference with both sides.

If ever a motion for a new trial was groundless and sham it surely is the instant one.

However, in defendants' "Statement of Points" upon which they rely, they still specify these grounds.

Even the opening brief (p. 33) nominally clings to the same ground for reversal of the judgment, based, it must be remembered, on the Combs' affidavit and nothing else.

It is true that this ground is not named in the matters to be argued. (Op. Br., p. 43), but its retention in the brief for any purpose, perhaps merely for the moral affect is unwarranted since it was shown, and virtually admitted that it was unfounded.

The Alleged Errors

Under "Point VII" and the caption charging bias and prejudice against the court, the opening brief next descends to three mere assignments that the court "erred," and concludes by a weak and pitiful complaint of the "plaintiff herself" because she "traveled without a cast," and "greatly accentuated and made permanent an otherwise curable injury."

Truly, this is like the final taper into nothingness of the mouse's tail.

The errors of which complaint is made are not discussed or attempted to be shown to be either erroneous, material or prejudicial, and the concluding complaint against the plaintiff herself quite obviously concerns a matter for discussion with the jury, but not appropriate for presentation to an appellate court at all, much less under an assignment of bias and prejudice of the trial court.

Ample authority has been cited which hold that under such circumstance the alleged errors are waived.

Attention is also called to the general rule that a point raised for the first time in a reply or a supplemental brief,[6] will not be considered and the appellate court will not examine the record in a search for prejudicial errors which are not "clearly pointed out" in the brief of the complaining party.

With reference to instructions assigned as erroneous the complaining party must call attention to reasons why they are erroneous and show wherein he was prejudiced.[7]

On the amount of the verdict we shall not give extended argument. Appellants' brief on this point simply suggests "numerous errors and comments by both court and counsel during the trial and the argument contributed in this case (along with several rulings on evidence) to an excessive verdict." (Op. Br., p. 86.)

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[6]See 5 *C. J. S.*, p. 1230, and 5 *C. J. S.*, p. 1914, and decisions cited, including *Nash v. Rehman Bros.*, 53 F. (2d) 624.

[7]*Truman v. Sutter-Butte C. Co.*, 76 Cal. App. 293; *In re McDonald's Estate*, 191 Cal. 161.

Nothing further is stated, no reasons, citations or references are given. In reply we suggest, that this matter was passed upon by the trial court on defendants' motion for new trial, and the injuries and damages suffered by appellant do support the amount of the verdict. When it is remembered that plaintiff earned in excess of $100 a week average including her summer performances over the world; that her meals and transportation were furnished by defendants; that the accident happened in 1937; that she has not worked a day since the accident or earned any money; the seriousness of her injury and her great pain and suffering all these years; that she will never be able to perform again; that she is unable to walk or be about without the aid of crutches; that her injuries are permanent, certainly the verdict is not excessive.

CONCLUSION

In conclusion respondent submits that the decision of this Court as set forth in its opinion on the former appeal is decisive of each of the major issues presented by Appellants' Opening Brief, and that the other points have been waived by reason of insufficiency of proper presentation.

It is said in American Jurisprudence, Volume 5, page 332:

> "As a general rule, the appellants' brief must be so prepared that all questions presented by the assignments of error can be determined by an

> examination of the briefs, without looking to the record, and questions not so presented . . . are usually considered waived."

Surely this Court cannot determine, without searching and analyzing the record, any of the questions presented in Appellants' Points VII or those whose lack of proper presentation in the other points in the opening brief have been pointed out.

We regret having been compelled to reveal many errors in factual statements in that brief, and also, that this reply could not have been shorter.

On many of the issues reliance upon the doctrine of law of the case would suffice, but it has seemed that other considerations which refute or bar appellants' several contentions should also be pointed out.

It is submitted that the judgment of the District Court should be affirmed.

DAVID C. MARCUS,
Attorney for Appellee.

Appendix

APPENDIX

Appeal from the District Court of the United States for the Southern District of California, Central Division; Campbell E. Beaumont, Judge.

Personal injury action by America Olvera, also known as America Olvera Pollinger, against Ringling Bros.-Barnum & Bailey Combined Shows, Incorporated; and Al G. Barnes Amusement Company, sued as Al G. Barnes, Incorporated. The cause was removed from the state court. From an adverse judgment, Ringling Bros.-Barnum & Bailey Combined Shows, Incorporated, and Al G. Barnes Amusement Company, sued as Al G. Barnes, Incorporated, appeal. The appeals were consolidated.

Reversed.

Combs & Murphine, of Los Angeles, Cal., for appellant Ringling Bros.-Barnum & Bailey Combined Shows, Inc.

Arthur Garrett, of Los Angeles, Cal., for Appellant Al G. Barnes Amusement Co.

David Marcus, of Los Angeles, Cal., for appellee.

Before DENMAN, MATHEWS, and HEALY, Circuit Judges.

DENMAN, Circuit Judge.

These are consolidated appeals from a judgment upon a verdict awarding damages to America Olvera, hereafter called Olvera, for injuries to her while performing as a trapeze artist, against each of two circus corporations. Ringling Bros.-Barnum & Bailey Combined Shows, Inc., hereafter called Ringling and Al. G. Barnes Amusement Company, hereafter called Barnes.

Olvera, in Florida, entered into a contract with Ringling by which she agreed, as an independent contractor, to give her performances as a trapeze artist in Ringling's and other circuses. Among other agreements it provides that Ringling "by agreement reserves the right to transfer and place the artist during the term or part term of this contract, with any other of *its* shows or circuses—under its ownership or *management* all the terms and conditions of this contract continuing, prevailing and obtaining."

Appellants admit that the stock control of both circuses was in a common trust, though each has an independent corporate existence. In connection with this admission there is evidence from which the jury properly could infer that Ringling placed Olvera with Barnes; that Barnes' circus was one of "its", Ringling's, circuses within the meaning of the above agreement; that it was under the management of Ringling at the time Olvera received her injuries in one of Barnes' performances; and that they were caused by either the gross negligence or the ordinary negligence of Barnes' employees while so under Ringling's management.

Olvera further agreed:

"8. The Artist represents that his act with the apparatus used is an ingenious creation of his own; that the 'act' by reason of the Artist's skill constitutes a 'feature' performance and is the consideration for this contract; that the Artist is familiar with conditions that obtain in the circus business; that he recognizes the necessity for safety of apparatus and timely presentation of his act.

"The Artist shall furnish and maintain in first-class condition at his expense all paraphernalia and equipment. The Artist constructs and presents his act with personnel of troupe under his exclusive control and supervision in all particulars. The Artist assumes exclusive supervision regarding inspection of the act and premises, and agrees to keep the premises safe, warrants that all persons appearing or practicing in the act are conversant with and suitably fitted for same."

There was evidence from which the jury could infer that Barnes had assumed those incidents of Olvera's act which consisted of furnishing and "maintaining" parts of its "equipment" and "apparatus," namely, the trapeze on which she performed and a net and persons to maintain it beneath her trapeze to catch her in safety in the event of an untimely fall; and that there was either gross or ordinary negligence in setting up and maintaining the trapeze whereby her fall was occasioned, and on the part of the net holders in failing to hold it under her, causing the injuries and the damages to her for which the jury gave its verdict.

Were these all of the contract provisions involved, the judgment would have to be sustained.

Appellants complain of the lower court's refusal to give the following instruction concerning a clause of the contract providing that Olvera agreed that she "accepts all risks incident to the business":

"Instruction No. 14. In this case if you believe from the evidence that the plaintiff at or before the time of the injury knew and appreciated the danger and peril of the work in which she was engaged at the time of the injury and understood the same, and then chose to engage in the work which exposed her to such perils and danger, she cannot recover, and in determining the question whether or not the plaintiff knew, appreciated and understood the perils and danger of the work in which she was engaged. you will consider the evidence as to plaintiff's age and mentality, and as to her previous experience with a trapeze or similar apparatus, and all other evidence bearing upon said issue."

The instruction was properly refused. Olvera might recover though she knew the danger and peril of the work she was engaged in and chose to accept them, unless the danger and peril were the proximate cause of her injuries. The requested instruction is fatally defective because not containing some such words after the words "she cannot recover" as "if her injuries were caused by such danger and peril."

Appellants contend that the construction of the contract terms, both as to initial validity and as to performance, is governed by the law of Florida, and that the Florida law requires a construction of a provision of the contract, hereafter considered, to the effect that appellants are not liable for ordinary negligence but only for "gross, willful or criminal negligence." It is hence urged that the court erred in refusing to give the following instruction:

"Instruction No. 1-A. You are instructed that the burden of proving her case rests upon the plaintiff, and that in order to recover against the defendants. or either of them, the plaintiff must establish by preponderance of the evidence that said defendants were guilty of gross negligence and that such negligence on the part of the defendant was a direct and proximate cause of the injury to the plaintiff.

"Gross negligence is different from and greater than ordinary negligence. Gross negligence has been defined as want of slight diligence, as an entire failure to exercise care, or the exercise of so slight a degree of care as to justify the belief that there was an indifference to the things and welfare of others, and as that want of care which would raise a presumption of the conscious indifference to consequences."

The injuries to Olvera occurred in a performance while the circus was traveling through Kansas. At the pretrial conference it was stipulated that Florida was the place of making of the contract and the stipulation made a part of the pretrial order. This pretrial stipulation is binding unless modified at the trial (Federal Rules of Civil Procedure, rule 16, 28 U.S.C.A. following section 723c). At the trial there was evidence from which it could be inferred that the contract was executed in Texas, but the order was not modified and we hold the stipulation is binding.[1]

This suit was commenced in the Superior Court of the State of California and from there removed to the United States District Court for the Southern District of California. The contract does not indicate any state in which it is to be performed and the rule that, in such a case, the law of the place of making controls its interpretation is well stated by the Civil Code of California, here the law of the forum: "§ 1646. A contract is to be interpreted according to the law and usage of the place where it is to be performed; or, if it does not indicate a place of performance, according to the law and usage of the place where it is made."

The contract itself provides that the law of Florida shall control its interpretation: "10. The place of this contract, its status or forum is at all times Sarasota County, Florida. That in said county and State of Florida shall all matters whether sounding in contract or in tort relating to the validity, constructions, interpretation and enforcement of this contract, be determined."

Here is a contract to perform in one or more circuses traveling from state to state. It was competent for the parties, even if the law of the forum was different, to agree upon and fix the law controlling all the liabilities and obligations of the parties with regard to performance as that of the state of the contract's execution, and not have it constantly shifting as the circus wandered from one jurisdiction to another.[2]

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[1]See footnote infra showing the identity of the law of Texas and Kansas with that of Florida on the interpretation of the pertinent contract provisions.

[2]Boseman v. Insurance Co., 301 U.S. 196, 202, 203, 206, 57 S.Ct. 686; 81 L.Ed. 1036, 110 A.L.R. 732; Seeman v. Philadelphia Warehouse Co., 274 U.S. 403, 407-409, 47 S.Ct. 626, 71 L.Ed. 1123; Pritchard v. Norton, 106 U.S. 124, 136, 1 S.Ct. 102, 27 L.Ed. 104; Clark v. Gibbs, 5 Cir., 69 F.2d 364, 365; Bertonneau v. Southern Pac. Co., 17 Cal. App. 439, 443, 120 P. 53; Palmer v. Atchison, etc., R. R. Co., 101 Cal. 187, 195, 35 P. 630; Cf. Owens v. Hagenbeck-Wallace Shows Co., 58 R.I. 162, 192 A. 158, 163, 164, 112 A.L.R. 113, 121, 122.

The provision of the contract which, under the Florida law, appellants claim exempts them from their ordinary negligence, is: "12. Now, therefore, for valuable consideration, the Artist for himself and the persons comprising his troupe does hereby release and discharge the Show, their members, agents and servants and any transporting railroad company handling the Show's circus train movements, of and from claims, demands, causes of action, damages, liabilities or things whatsoever growing out of any injury or accident to the person and/or property of the Artist in any transaction whatsoever during the period of performance under this contract and that the Artist for himself and the personnel of his troupe accepts all risks incident to the business, and assumes responsibility as an independent contractor which condition constitutes the essence of this contract."

It will be noted that negligence is not mentioned as an excepted liability. Appellees claim the provision is so broad that it cannot be deemed to exempt the appellants from any sort of liability. There is not cited, nor are we able to find, any Florida case construing such a provision. However, the common law prevails in Florida.[3] The United States Supreme Court, in determining the common law with regard to such agreements, before Erie Railway v. Tompkins, 304 U.S. 64, 58 S. Ct. 817, 82 L.Ed. 1188, 114 A.L.R. 1487, has held that, though negligence is not mentioned in the exempting clauses, such broad provisions going to the essence of liability as "all risk of loss or damage", "at consignee's risk of loss and damage", "all risk of accident to person and baggage", and "no obligation or risk in case of accident or damage to men and supplies" relieve from liability for ordinary negligence a railroad company contracting in its private and not public service capacity. Santa Fe Ry. v. Grant Bros.

[3]Cummer Lumber Co. v. Silas, 98 Fla. 1158, 125 So. 372, 374; Co-operative Sanitary Baking Co. v. Shields, 71 Fla. 110, 70 So. 934; Ingram-Dekle Lumber Co. v. Geiger, 71 Fla. 390, 71 So. 552, 554, Ann.Cas.1918A, 971.

Const. Co., 228 U.S. 177, 188-194, 33 S.Ct. 474, 478, 57 L.Ed. 787.[4]

In Florida prevails an almost complete survival of the common law freedom of contract.[5] It is clearly inferable from the language of the Florida supreme court in Atlantic Coast Line Ry. v. Beazley, 54 Fla. 311, 45 So. 761, 770, 787, that Florida has no public policy against contracts exempting railways from liability for negligence even to their railway employees,[6] apart from a specific statute, that court stating: "All parties litigant who are sui juris, whether railroad corporations or their employes, in the eyes of the law, before the courts stand upon an equal footing, entitled to equal rights and protection, and none to special privileges. In no sense of the word can railroad employes be said to be wards of the court, nor would they wish to be so regarded. . . . It may well be that plaintiff made a rather hard bargain with defendant; but with that we have nothing to do, so long as no fraud or deception was practiced and the contract was legal in all respects. Scotch Manufacturing Co. v. Carr [53 Fla. 480] 43 So. 427."

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[4]Accord: Robinson v. Baltimore & Ohio R. R. Co., 237 U.S. 84, 35 S.Ct. 491, 59 L.Ed. 849; New York Cent. Railroad Co. v. Lockwood, 17 Wall. 357, 21 L.Ed. 627; Long v. Lehigh Valley R. Co., 2 Cir., 130 F. 870; McCormick v. Shippy, 2 Cir., 124 F. 48; Chicago, etc., R. Co. v. Wallace, 7 Cir., 66 F. 506, 30 L.R.A. 161; World's Columbian Exposition Co. v. Republic of France, 7 Cir., 96 F. 687, 694, 695; Bates v. Railroad Co., 147 Mass. 255, 17 N.E. 633; Hosmer v. Railroad Co., 156 Mass. 506, 31 N. E. 652; Barrett v. Conragan, 302 Mass. 33, 18 N.E.2d 369; Clarke v. Ames, 267 Mass. 44, 165 N.E. 696; Northwestern Mut. Fire Ass'n v. Pacific Wharf & S. Co., 187 Cal. 38, 200 P. 934; Weirick v. Hamm Realty Co., 179 Minn. 25, 228 N.W. 175, 176; Holly v. Southern Ry. Co., 119 Ga. 767, 47 S.E. 188, 189; Cato v. Southern Ry. Co., 26 Ga. App. 578, 107 S.E. 98, 99; Niederhaus v. Jackson, 79 Ind.App. 551, 137 N.E. 623, 624; Missouri Pac. R. Co. v. Fuqua, 150 Ark. 145, 233 S.W. 926; Fidelity Union Life Ins. Co. v. Fine, Tex.Civ. App., 120 S.W.2d 138; see also Kansas City, Ft. S. & M. R. Co. v. B. F Blaker & Co, 68 Kan. 244, 75 P. 71, 64 L.R.A. 81, 1 Ann.Cas. 883.

[5]Scotch Mfg. Co. v. Carr, 53 Fla. 480, 43 So. 427, 428; Hall v. O'Neil Turpentine Co., 56 Fla. 324, 47 So. 609, 612, 613, 16 Ann.Cas. 738; Southern Home Ins. Co. v. Putnal, 57 Fla. 199, 49 So. 922, 930; Mizell Live Stock Co. v. J. J. McCaskill Co., 59 Fla. 322, 51 So. 547, 550; Prudential Ins. Co. of America v. Prescott, 130 Fla. 11, 176 So. 875, 880, 881; Pierce v. Isaac, 134 Fla. 666, 184 So. 509, 513; Travers v. Stevens, 108 Fla. 11, 145 So. 851, 854, 855; Mitchell v. Mason, 65 Fla. 208, 61 So. 579, 589, 590; Davis v. Strine, 141 Fla. 23, 191 So. 451, 452; City of Leesburg v. Ware, 113 Fla. 760, 153 So. 87, 89, 90; Florida Nicolson v. Good Samaritan Hospital, Fla., 199 So. 344, 349. Cf. Ireland v. Craggs, 5 Cir., 56 F.2d 785, 787.

[6]In Texas there is no public policy against contracts between ordinary and independent contractors, like Olvera, which exempt from liability for ordinary negligence. Missouri, K. & T. Ry. v. Carter, 95 Tex. 461, 68 S.W. 159, 164-166; Fidelity Union Life Ins. Co. v. Fine, Tex.Civ.App., 120 S.W.2d 138, 139.

Similarly in Kansas, independent contractors may exempt themselves from

We hold that the last cited provision of the Ringling-Olvera contract exempts the appellants from liability for their ordinary negligence and the court erred in refusing the requested instruction concerning their liability solely for gross negligence.

The judgment is reversed.

MATHEWS, Circuit Judge (concurring in the result).

There was no evidence warranting a finding that the injuries sustained by appellee Olvera were proximately caused by the negligence—gross, or ordinary—of appellants or either of them. Appellants' motion for a directed verdict should have been granted.

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liability for ordinary negligence. Thirlwell v. Hines, 108 Kan. 700, 196 P. 1068, 1069; Griffiths Grain Co., v. St. Joseph & G. I. Ry. Co., 94 Kan. 590, 146 P. 1134; Kansas City, Ft. S. & M. R. Co. v. B. F. Blaker & Co., 68 Kan. 244, 76 P. 71, 64 L.R.A. 81, 1 Ann.Cas. 883; See also Atchison, T. & S. F. Ry Co. v. Fronk, 74 Kan. 519, 87 P. 698, 699, 700, 11 Ann.Cas. 174, and Sewell v. Atchison, T. & S. F. Ry., 78 Kan. 1, 96 P. 1007, where the Kansas supreme court distinguishes between contracts attempting to exempt railways from liability to their employees for negligence and such valid provisions in agreements between independent contractors.